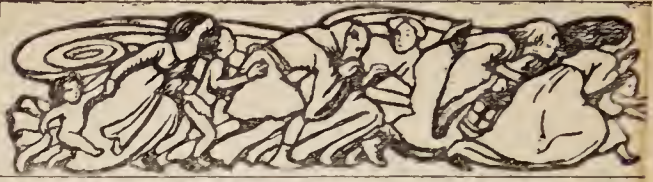

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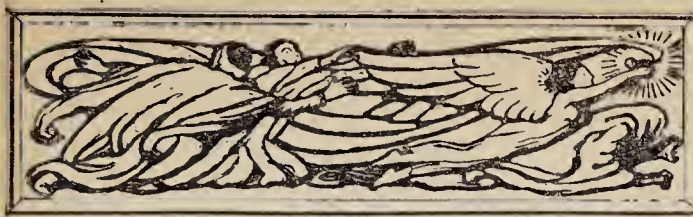

ELEMENTS OF ENGLISH LAW

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ELEMENTS OF ENGLISH LAW

CHAPTER I

STATUTE LAW AND COMMON LAW

1. LAW AND LAWS.—We commonly speak both of law and laws—the English Law, or the Laws of England; and these terms, though not used with precision, point to two different aspects under which legal science may be approached. The laws of a country are thought of as separate, distinct, individual rules; the law of a country, however much we may analyse it into separate rules, is something more than the mere sum of such rules. It is rather a whole, a system which orders our conduct; in which the separate rules have their place and their relation to each other and to the whole; which is never completely exhausted by any analysis, however far the analysis may be pushed, and however much the analysis may be necessary to our understanding of the whole. Thus each rule which we call *a* law is a part of the whole

which we call *the* law. Lawyers generally speak of *law*; laymen more often of *laws*.

There is also a more precise way in which we use this distinction between law and laws. Some laws are presented to us as having from the beginning a separate and independent existence; they are not derived by any process of analysis or development from the law as a whole. We know when they were made and by whom, though when made they have to take their place in the legal system; they become parts of *the* law. Such laws in this country are for the most part what we call Acts of Parliament, or, as they are called generally by lawyers, statutes; collectively they are spoken of as Statute Law. On the other hand, putting aside for the present the rules of Equity, the great body of law which is not Statute Law is called the Common Law. The Common Law has grown rather than been made. We cannot point to any definite time when it began; as far back as our reports go we find judges assuming that there is a Common Law not made by any legislator. When we speak of an individual law we generally mean a statute; when we speak of *the* law we are thinking of the system of law which includes both Statute and Common Law, perhaps more of the latter than of the

former. A rule of the Common Law would rarely, if ever, be spoken of as *a* law.

This distinction between law as a system and laws as enactments is brought out more clearly in those languages which use different words for each: the French *droit*, the German *Recht* mean "law"; *loi* and *Gesetz* mean "a law."

2. The Relations between Statute Law and Common Law.—(1) In spite of the enormous bulk of the Statute Law—our statutes begin in 1235 in the reign of Henry III, and a large volume is now added every year—the most fundamental part of our law is still Common Law. No statute, for instance, prescribes in general terms that a man must pay his debts or perform his contracts or pay damages for trespass or libel or slander. The statutes assume the existence of the Common Law; they are the addenda and errata of the book of the Common Law; they would have no meaning except by reference to the Common Law. If all the statutes of the realm were repealed, we should still have a system of law, though, it may be, an unworkable one; if we could imagine the Common Law swept away and the Statute Law preserved, we should have only disjointed rules torn from their context, and no provision at all for many of the most important relations of life.

(2) On the other hand, where Statute Law

and Common Law come into competition, it is the former that prevails. Our law sets no limits to the power of Parliament. "The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions."[1] No court or judge can refuse to enforce an Act of Parliament. No development of the Common Law can repeal an Act of Parliament. The Common Law cannot even correct its own defects by taking away what it has once finally laid down. Thus large parts of the Common Law have from time to time been abolished by Act of Parliament, and their place has been taken by statutory rules.

This supremacy of the statute-making power is not a logical or even a practical necessity; it is a rule of our Constitutional Law. It is quite conceivable, and it was at one time supposed to be the case, that there were principles of the Common Law which would control an Act of Parliament. We read in a seventeenth-century report: "It appears in our books that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for whenever an Act of Parliament is against right and reason or repugnant or impossible to be performed, the Common

[1] Dicey, *Law of the Constitution*, p. 37.

Law will control it and adjudge such Act to be void." There is a faint echo of this view in Blackstone's *Commentaries* (1765), p. 41, but it has long ceased to be held. It is well known that under the Constitution of the United States neither the Congress nor the State legislatures have an unlimited power of legislation.

(3) How do we know the law? Here there is a great difference between Statute and Common Law. A statute is drawn up in a definite form of words, and these words have been approved by Parliament and have received the Royal assent. In general there is no difficulty in ascertaining the words of a statute. At the present day two identical printed copies are made, each bearing a certificate of the Clerk of Parliaments that the Royal assent has been given, and in the last resort reference can be made to these copies for the purpose of ascertaining the true words of the statute. For practical purposes any copy made by the King's printer is sufficient. In the case of some old statutes there is a possible doubt not only as to the exact words of a statute, but even whether such a statute was ever made; but in practice such doubts hardly ever arise.

Still the words of the statute are not the statute itself; the law expressed by the

words is not the same thing as the words which express it. Thus a person imperfectly acquainted with English may know the words of the statute, but he will not know the law. The same is true in a greater or less degree of any one who comes to the reading of a statute without sufficient legal knowledge. The interpretation of a statute requires not only a knowledge of the meaning of legal technical terms, but also of the whole system of law of which the statute forms a part; in particular it requires a knowledge of the legal rules of interpretation, which are themselves rules of law. Some of these are Common Law rules; some are themselves statutory. Thus there is Common Law rule that in interpreting a statute no account must be taken of anything said in debate while the statute was passing through its various stages in Parliament; as far as possible the words of the statute must speak for themselves. So there is a statutory rule that in Acts made since 1850, unless a contrary intention appears, masculine words shall include the feminine, words in the singular shall include the plural, words in the plural shall include the singular.

Even lawyers may differ as to the meaning of a statute. If such a question arises for the first time in a lawsuit, the judge will have to decide the meaning in accordance

with the recognised rules of interpretation, and his decision will be a binding authority for all future cases in which the same question arises, just as we shall see that a judge's decision is a binding authority for future cases where a question arises as to the Common Law. In this way many statutes—especially the older ones—have become overlaid with a mass of judicial interpretation which cannot be departed from. The Statute of Frauds[1] is a notable instance.

On the other hand, we have no authoritative text of the Common Law. There is no one form of words in which it has as a whole been expressed at any time. Therefore in a sense one may speak of the Common Law as unwritten law in contrast with Statute Law, which is written law. Nevertheless the sources from which we derive our knowledge of the Common Law are in writing or print. First among these come the reported decisions of the judges of the English courts. Ever since the reign of Edward I there have been lawyers who have made it their business to report the discussions in court and the judgments given in cases which seemed of legal interest. Thus we have the Year-Books, which are reports of cases made by anonymous reporters from

[1] See p. 185.

the time of Edward I to that of Henry VIII. These are followed by reports produced by lawyers reporting under their own names, reaching down to our own time, and receiving fresh additions every year. At the beginning these reports seem to have served mainly the purpose of instruction and information. The fact that a judge had stated that such and such was the law was evidence, but not more than evidence, that such was the law. He might have been mistaken; another judge might perhaps decide differently. But in course of time we find a change in the attitude of judges and lawyers towards reported decisions. The citation of decided cases becomes more frequent; greater and greater weight is attached to them as authorities. From the sixteenth century onwards, if not earlier, we may say that decided cases are regarded as a definite authority, which, at least in the absence of special reasons to the contrary, must be followed for the future. For the last three hundred years, at any rate, the decisions of judges of the higher courts have had a binding force for all similar cases which may arise in the future.

3. The Binding Force of Precedents.—This binding force is not, however, in all cases an irresistible one. The highest Court of Appeal in the country for the overwhelming majority

of English cases—the House of Lords—has held more than once during the last hundred years that it will not allow a previous decision given by it to be called in question. It seems unlikely that in the future it will depart from this view of the absolutely binding nature of its own decisions. All English courts which rank below the House of Lords are absolutely bound by its decisions. So, too, the judgments of the Court of Appeal, which stands next below the House of Lords, are binding declarations of the law for all lower courts, and even for itself. There have, however, been one or two cases in which a decision of the Court of Appeal, when given in obvious forgetfulness of what had been previously decided, has not been followed, even by a lower court.

A decision given by a court lower than the Court of Appeal is binding on courts of equal rank, except where it is clearly inconsistent with established principles of law, or where there is no previously settled rule which is clearly more reasonable.

On the other hand, a decision of a lower court is not, in the first instance, binding on any court ranking above it. But in the course of time it may acquire an authority which even a higher court will not disregard. It may happen that a question has never been

carried up to the Court of Appeal or to the House of Lords, but that the lower courts have repeatedly decided it in the same way; or it may be that even a single decision of a lower court has remained for a long time unquestioned. In such a case the necessary result will be that lawyers and the public have come to regard such a decision as law, and have acted as if it was law. People will have made contracts, carried on business, disposed of their property, on the faith of such a decision, and the reversal of the rule would involve enormous hardship. It is often more important that the law should be certain, than that it should be perfect. The consequence is that even a higher court, though it may think a decision of a lower court wrong in principle, will refuse to overrule it, holding that the evil of upsetting what every one has treated as established is greater than the evil of allowing a mistaken rule to stand. The cure in such a case is an alteration of the law by statute, for an alteration by statute does not work the same hardship as a reversal by a higher court of what was supposed to be the law. A statute need not, and as a rule does not, affect anything done before it was passed. Previous transactions remain governed by the law in force at the time they were made. But the theory or

fiction of our case law is that the judge does not make new law, but only declares what was already law; so that if a higher court overrules the decision of a lower court, it declares that what was supposed to be law never really was law, and consequently past transactions will be governed by a rule contrary to what the parties believed to be law. A curious case occurred recently with regard to the Earldom of Norfolk, where the House of Lords held that the rule that a peerage cannot be surrendered, though it was first established in the seventeenth century, must be treated as having been in force at the beginning of the fourteenth century. "Whenever," said Lord Davey, "a court or this House acting judicially declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days."

4. Ratio Decidendi and Obiter Dictum.—If you open a volume of the Law Reports and read the report of a case, how will you discover the law which the decision lays down? how will you find what is called the *ratio decidendi*—the principle on which the decision is based? Remember that the judge is not a legislator. It is not his business—in form at any rate—to *make* rules of law; his first duty is to decide the dispute between the parties.

The dispute may be largely a question of fact. In some cases the questions of fact will have been already answered by a jury; in others the judge himself will have to decide questions of fact. At any rate, the judgment will involve the application of principles of law to concrete facts. The reader of a Law Report must therefore first disentangle the law stated in a judgment from the facts to which it is applied. That may be a difficult matter. No form is prescribed in which judgments must be delivered, and it may often be a matter of doubt how far a decision turns on the view which the judge took of the facts, and how far on a rule of law which he considered applicable. The headnote which is put at the beginning of a report of a case generally contains a statement of the rule supposed to be involved. But this headnote is not part of the report; it is merely the reporter's own view of the effect of the judgment. In using a Law Report, therefore, every one is free, where there is room for doubt, to hold his own view of what was the law laid down in any particular case, unless and until the doubt has been settled by a subsequent decision.

From the *ratio decidendi* we must carefully distinguish what are called *dicta* or *obiter dicta*—"things said by the way."

An *obiter dictum*, strictly speaking, is a statement of the law made in the course of a judgment, not professing to be applicable to the actual question between the parties, but made by way of explanation or illustration or general exposition of the law. Such *dicta* have no binding force, though they have an authority which is entitled to respect and which will vary according to the reputation of the particular judge.

We sometimes find that a judge in deciding a case will profess to decide it on a principle really wider than is necessary for the purpose, when it might have been decided on some already recognised but much narrower ground. In such a case the supposed principle is in effect equivalent to an *obiter dictum*; it will not be treated as the true *ratio decidendi* of the case. But of course it may be a difficult problem to determine how far the rule is really wider than necessary.

Another difficulty sometimes occurs where the judges of a court agree in the result, but give different reasons. In such cases the matter is left open for a judge in a subsequent case to decide which reason is the right one.

5. How far do the Judges make the Law?—I have spoken hitherto of judicial decisions, not only as the source from which

we get our knowledge of the Common Law, but also as binding authorities. But this is consistent with two different views of the relation of the judges to the law. First, and this is the older theory, we may suppose that a judicial decision is no more than a declaration and evidence — but conclusive evidence — of what already exists; the Common Law, as a whole, it is said, has existed from time immemorial in the minds of judges and lawyers—perhaps in the minds of the people at large so far as they could understand it—and every decision is merely a manifestation of it. We find this view in Hale's *History of the Common Law* (1713) and in Blackstone (1765). Secondly, we find writers like Bentham and Austin speaking of "*the childish fiction* employed by our judges that Judiciary or Common Law is not made by them, but is a miraculous something made by nobody, existing I suppose from eternity, and merely declared from time to time by the judges." According to the view of these writers and others who have followed them, like Salmond and Gray, judges are really law-makers, and in laying down the law exercise a function almost, if not exactly, like that of the legislator in making new law from time to time. The two points of view are admirably stated in

Maine's *Ancient Law*:[1] "With respect to that great portion of our legal system which is enshrined in cases and recorded in Law Reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before our English court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have—to use the very inaccurate expression sometimes employed—become more elastic; in fact, they have been changed. A clear addition has been made to the precedents,

[1] P. 35 (ed. 1908), and see Sir F. Pollock's note, p. 46.

and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example."

I think that neither of these views is the whole truth. On the one hand, it is, of course, untrue that our Common Law has always been the same, even if we disregard the changes made by statute. No one can seriously imagine that the Common Law of five hundred years ago would have had an intelligible answer to many of the legal questions of modern life. We know, as a matter of fact, that it answered some questions in the opposite sense to that in which we now answer them, *e.g.* a simple executory contract had no legal effect then, and we can trace the steps by which it acquired legal effect. On the other hand, to say that a judge in deciding is ever doing anything analogous to legislation is really doing violence to the facts. In the majority of cases where a new precedent is established, the process is obviously that of applying existing acknowledged principles to a new set of facts. The principles, it may be, give no explicit answer to the question put. It does not follow that they give no answer at all. By a process of deduction, by argument from analogy, the existing principles

may be made to yield a new principle, which is new because never explicitly stated before, but which in another sense is not new because it was already involved in what was already acknowledged. Just in the same way the conclusions of a science may be involved in its premisses, and yet when first made constitute something new, an addition to what was before acknowledged. Even where a decision does not follow a definite logical process from acknowledged principles, it has not the arbitrary character of legislation. In the absence of clear precedents which might govern a question, we find judges relying on such considerations as the opinions of legal writers, the practice of conveyancers, the law of other modern countries, the Roman Law, principles of "natural justice" or public policy. The proper application of these may be a matter of dispute and difficulty, but in any case the judge is applying a standard; he shows that he is not free to decide, as a legislator would be, as he pleases; he is bound to decide according to principle. If we say that the judge really *makes* the law like a legislator, we shall be bound to say that the facts of the case were previously governed by no law;[1] they fell outside the

[1] Professor Gray accepts this conclusion (*Nature and Sources of the Law*, p. 96).

realm of law when they occurred, and are only brought within it when the decision is given. To argue that this is so, because before the decision no one knew with certainty what the law was, is like arguing that a piece of land is valueless until it has been sold, or until a valuer has made a valuation of it, because till then no one knows with certainty for what it will be sold or for at what figure it will be valued. In truth, the parties in fixing the price, or the valuer in making the valuation, have really tried to discover something already existing. The analogy goes further; just as the price or the valuation, even though mistaken, will be a new element which will help to determine the value for the future, so the judge's decision of the law on a given question, whether right or wrong, fixes or helps to fix the law for the future.

Again the view that till a rule is laid down in a legal decision there is no law governing the facts of the case, will really lead to the conclusion that no concrete set of facts is governed by any law till a decision has been given, because in every case the process of decision involves the mental process of bringing the particular facts within some principle. Suppose, on the one hand, a question whether A's conduct amounted to an acceptance of an offer; on the other, whether a given

transaction is contrary to public policy. There is an apparent, but not a real difference. In the former case the existing principles are so well defined that it looks as if the facts automatically, as it were, fall into the pigeon-hole which the law provides; in the latter the principle is so wide, that in order to apply it the judge must explicitly and openly say, "conduct which has such and such qualities is contrary to public policy," and so frame a rule which defines and develops the conception of public policy. But in the former case the same process has really been gone through. The act does not really fall automatically into the pigeon-hole; the judge must have had in his mind the qualities of an act which will make it an acceptance; the judge really says, "conduct such as that in this case amounts to an acceptance." The bringing of concrete facts under a rule is always a mental process, and a process of generalisation. In this way every case which is decided means a development of the principle which is applied. The practical difference is that in the majority of cases the application is so easy, and the development of the existing principle so infinitesimal, that the case is not worth reporting, and therefore, for *practical* purposes, adds nothing to the law.

A distinction is sometimes made between

"declaratory" precedents, which merely declare existing law and "original" precedents which lay down new law. In truth the difference is one of degree and not of kind. If we have a case which deals with certain facts by applying an acknowledged rule, we really have an addition to the rule, because we now know that a certain kind of fact falls within it, and in the nature of things we can never have two sets of facts which are precisely similar. No precedent is purely "declaratory" or purely "original."

The contradiction between the view that judges merely declare the Common Law, and the view that they make new law in the same way as a legislator does, is solved by the conception of evolution or development which was not familiar either to the old lawyers like Blackstone or to their critics like Austin and Bentham. The essence of that conception is that a thing may change and yet remain the same thing. To ask whether our law of to-day is the same law as the English law of five hundred years ago, is, to use a phrase of Sir Frederick Pollock,[1] "like discussing whether the John Milton who wrote *Samson Agonistes* was really the same John Milton who wrote *Lycidas*." It is the same and not the same. Every legal decision is a step

[1] *First Book of Jurisprudence*, p. 226.

in the process of growth. In every case it is true that there is already a law applicable to the facts; it is equally true that when the decision has been given, the law is not precisely what it was before. The "*double language*" which Maine refers to as evidence of a deep-seated fiction is really an expression of a fundamental truth.

6. Advantages and Disadvantages of Case Law.—The system of Case Law is peculiar to England and the countries which have derived their law from England. Its essential principle is the rule that decided cases are binding authorities for the future. In other countries this is not so, or was not so till recently. In other countries the judge, in his application and interpretation both of enacted law and of the general principles which will always underlie and supplement enacted law, is not bound by previous decisions of the same or any other court, but is free and indeed is bound to decide according to the best of his own judgment.

The great advantage of a system of Case Law in the English sense are three:

(1) *Certainty.*—The fact that decided cases are binding authorities for the future makes it certain or at least highly probable that every future case which is essentially similar will be decided in the same way. People

may therefore regulate their conduct with confidence upon the law once laid down by the judges.

(2) *The possibility of growth.*—Wherever the way is not closed by statute or precedent, new rules of law will from time to time be authoritatively laid down to meet new circumstances and the changing needs of society. Where there is no system of Case Law the work of the judge who decides a case leaves no lasting mark on the law for the future: it is, as far as the development of the law goes, thrown away.

(3) *A great wealth of detailed rules.*—Our law is much richer in detail than any code of law (unless based on Case Law) can possibly be. The German Civil Code, for instance, consists of less than 2000 paragraphs.

The great disadvantages of Case Law are:

(1) *Rigidity.*—Where a rule has once been decided, even though wrongly, it is difficult or impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand.

(2) *The danger of illogical distinctions.*—When a rule which is binding is felt to work hardships, a judge will often avoid applying

it to cases which logically ought to fall within it, by laying hold of minute distinctions which will enable him to say that the later case is different from the earlier case in which the rule was established. Every now and then a precedent leads one into a blind alley, from which one has to escape as best one can. So, too, rules which are logically inconsistent with each other are sometimes developed along distinct lines of cases, which ultimately meet and come into conflict.

(3) *Bulk and complexity.*—The wealth of detail and the fact that the rules of law are to be found scattered over some 1000 volumes of law report, make the law extraordinarily cumbrous and difficult to learn and apply.

I have no doubt that the advantages of our system far outweigh the disadvantages. Still, the disadvantages are serious. The cure for them is to be found, and has from time to time been found, in Statute Law. Where rules have been definitely laid down which produce hardship, where the rules have been made complicated and illogical by attempts to avoid hardship, Statute Law must intervene to remove the hardship or to lay down simple and intelligible rules. So, again, where the law has been satisfactorily worked out in detail, but the mass of scattered decisions is unmanageable, Statute may undertake

the work of codification, an orderly arrangement of the established rules in statutory form. In this way some considerable portions of the Common Law have from time to time been converted into Statute Law without material alteration of substance; the labour of searching for decisions is removed or lessened, and the law is to some extent made accessible to persons who are not professional lawyers. Examples of such codification may be found in the Bills of Exchange Act, 1882, the Sale of Goods Act, 1893. How far the Common Law as a whole is capable of being or is likely to be codified in this way is a question which cannot be here discussed. But, at any rate, two conditions of a satisfactory codification may here be indicated: (1) It must reproduce without material loss the richness of detail which is a characteristic merit of our system of Case Law; we should not be content with a code of the brief and abstract kind which has been adopted and used with success in foreign countries; (2) the adoption of a code must not deprive us of the advantages which we at present enjoy from the principle of binding precedents; *i.e.* judicial decisions interpreting the code will still be binding, will still be a means by which the law will develop, will still be capable of enriching the law by framing detailed rules.

7. Other Sources of the Common Law.—The decisions of courts of other countries which administer a law derived from our own, such as the Irish, Colonial, and American courts, though not binding upon our courts, are entitled to great respect. Even the judgments given by the Judicial Committee of the Privy Council, which acts as a final Court of Appeal from the courts of the Colonies, are, strictly speaking, not binding upon our courts; but the fact that the members of that tribunal are to a large extent the same persons as the members of the House of Lords when it sits as an Appeal Court, greatly increases their authority. The House of Lords is a common Court of Appeal for England, Scotland, and Ireland, and where the principles involved are substantially the same, or where the question turns on a statute common to England and one or both of these countries, its decision on a Scotch or Irish case will be treated as binding authority for English cases.

Some of the works of the older writers, such as the *Commentary* written by Coke in the seventeenth century on the fifteenth century treatise of Littleton on *Tenures*, and Sir Michael Foster's work on *Crown Law*, written in the eighteenth century, are known as "books of authority," and have a

force nearly equal in binding effect to judicial decisions. Other treatises on law have a merely "persuasive" authority which will vary with the reputation of the writer. The practice of conveyancers — lawyers whose business it is to draw up conveyances, wills, and other legal documents—is sometimes valuable as evidence of what the law is.

8. Delegated Powers of Legislation.— In many cases Parliament has conferred by statute on public officers or bodies the power of making by-laws, rules, or regulations for definite purposes and within prescribed limits, and the exercise of such a power produces rules of law which are equivalent in force to statutory enactment. Thus a committee of judges and lawyers has power to make rules for the procedure in the High Court. In exercising this power they are genuinely legislating, they are not bound by precedent, but make such rules as they think proper. Among other bodies which have similar powers we may instance the Board of Agriculture, Municipal Corporations, and even Railway Companies.

CHAPTER II

COMMON LAW AND EQUITY

1. EQUITY AND MORALITY.—Apart from Common Law and Statute Law, the most important department of our legal system is Equity. We sometimes use the term "equity," or words corresponding to it, in popular language as if it was something altogether outside law. We speak of a judgment in a particular case or of a rule laid down in a judgment as being undoubtedly according to law, but as being "unfair," or "unjust," or "inequitable." In cases of this sort we are really passing a moral judgment upon the law. Such a moral judgment in no way affects the law. It may be a reason why the law should be altered by statute; it does not prevent it from being law, or affect its operation, as long as no alteration in the law is made by statute. But when a modern lawyer uses the terms law and equity he does not mean to say that equity is not law. He is speaking really of two different kinds of law—the Common

Law on the one side, the rules of Equity on the other, which are equally law. They are rules which are not merely morally but legally binding: they are enforced by the courts.

2. The Relation between Law and Equity.—(1) The fact that we have, not, it is true, two systems of law,[1] but two distinct bodies of rules known as Common Law and Equity, is due to the historical fact that we have had for centuries and until recently (*i.e.* till 1875) distinct courts, each of which administered only one set of rules.

(2) These two sets of rules, though distinct, must not be looked upon as two co-ordinate and independent systems. On the contrary, the rules of Equity are only a sort of supplement or appendix to the Common Law; they assume its existence but they add something further. In this way Equity is an *addendum* to the Common Law.

(3) Further, the rules of Equity, though they did not contradict the rules of Common Law, in effect and in practice produced a result opposed to that which would have been produced if the Common Law rules had remained alone. A Common Law right was

[1] The distinction between Law and Equity, or between strict and equitable law, occurs in other systems, such as the Roman. But in no other system have we two bodies of rules so sharply separated.

practically, though not theoretically, nullified by the existence of a countervailing equitable right. In this sense we may speak of a 'conflict or variance' between the rules of Law and the rules of Equity, in the language of section 25 of the Judicature Act, 1873.

(4) Though since the Judicature Acts came into force in 1875 the rules of Common Law and Equity are recognised and administered in the same court, yet they still remain distinct bodies of law, governed largely by different principles. In order to ascertain the rights of any set of facts, we must always ask (i) what is the rule of Common Law? (ii) what difference (if any) is made in the working of this rule by the existence of some rule of Equity applying to the case?

(5) Like the Common Law, the rules of Equity are judicial law, *i.e.* to find them we must look in the first instance to the decisions of the judges who have administered Equity.

3. History.—In the thirteenth century we find three great courts definitely established: King's Bench, Common Pleas, Exchequer. All are King's Courts, as opposed to Local Courts, Lords' Courts, Ecclesiastical Courts. Each has its proper sphere, but in course of time each of them extends its jurisdiction, so that the same matters may often be dealt with indifferently by any

one of them. All these three administer substantially the same law, which, by the time of Edward I, is already called Common Law, and is becoming a fairly definite body of rules, not incapable of growth and expansion in various directions, but still with well-marked outlines which cannot be transgressed. These Courts continue to exist till 1875, and are known as the Common Law Courts.

Standing outside these courts is the Chancellor. He is not originally a judge, nor has he a court. He is the head of a great Government office—what may be called the secretarial office; he is "the King's Secretary of State for all departments";[1] whatever writing has to be done in the King's name is done by the Chancellor or through him and his officers.

In one way the Chancellor is already brought into relation with the administration of justice, though not so as to enable him to modify the law at his pleasure. The writs, *i.e.* the King's commands that a person shall appear in one of the King's Courts in

[1] Maitland, *Equity*, p. 3. I take this opportunity of acknowledging my debt to Maitland's work for a great part (both in form and substance) of what I have to say in this chapter, and of referring the student to that work for fuller information.

answer to a claim, are issued in his name, as they still are to-day, and are issued from his office. Many writs are already framed and well recognised to meet the cases that usually arise; you can have them for the asking, if you pay the fee.

The question whether a man who considers himself wronged has a claim which he can make good will depend on the answer to the question, Is there a writ to meet his case, or if there is not one, can one be framed which the King's Courts will hold good? The Chancery, *i.e.* the Chancellor's office, has a power (Statute of Westminster II, 1285) of framing new writs *in consimili casu—i.e.* to meet new cases sufficiently like those for which writs already exist, and new writs are from time to time framed. But here the Common Law Courts have the last word, for they can decide whether the writ is good or not, and if not, the fact that the plaintiff has got the writ will not help him; and in deciding whether a writ is good or not the judges will be guided by the already accepted Common Law principles. Now it will sometimes happen that the working of the law and procedure of the Common Law Courts will result in particular cases in injustice and hardship. *We* might feel inclined to say: Well, that is a pity, but it would be

a greater evil to interfere ; it would be worse to make the law uncertain than to leave a particular hardship unredressed. That was not the way that our ancestors looked at the matter. Law and morality were not yet clearly distinguished, nor could one even say that the whole of law or justice was to be found in any one court ; the Ecclesiastical Courts, the Local Courts, administered a justice which was not the justice of the Common Law Courts ; so the thought was natural that even the King's justice was not exhausted in the powers conferred on his courts. A reserve of justice remained with the King, and so those who could not get relief in the King's ordinary courts might, with some hope of success, petition the King and his Council for redress, if not as a matter of right at least as a favour. These petitions in practice were referred to the Chancellor, who was the chief minister and secretary and the most learned member of the King's Council. In course of time these petitions came to be addressed direct to the Chancellor himself.

Putting aside what does not concern us here, cases where the petitioner asked for redress against the King himself, we may note two kinds of cases where this extraordinary relief is asked for : (1) where the petitioner

has suffered an undoubted legal wrong—been assaulted and beaten, or turned out of his property, but for some reason cannot get redress, because he is poor and his opponent is rich and powerful, because juries are corrupt or timid. In this class of cases the Common Law Courts and public opinion are too strong to tolerate interference; the rule is soon established that the Chancellor is not to hear cases which might be heard by the Common Law Courts. (2) Cases of transactions which give, at any rate, a moral right, but a right which the Common Law Courts cannot or will not protect. In particular we find the cases of what are called "uses" or trusts—transactions whereby a man legally transfers land to another, but with an understanding that the transferee will hold it for the benefit of the former, or for the benefit of those whom he will name in his will. The Common Law has already very strict notions as to the kinds of rights in land which it will protect, and the methods of transfer which it will allow. Uses and trusts the Common Law will not recognise; wills of land, it has decided, are void.[1] But the practice of creating these uses and trusts was popular and was growing, and the absence of all legal protection for

[1] It was only in 1540 that a statute was passed giving power to leave land by will.

them was a great hardship. So we find, by the end of the fourteenth century, that persons are directing petitions to the Chancellor, claiming that they have at least a moral right to the benefit of these uses, and begging him to give them help against the legal owner who is setting up his Common Law rights against them.

Now the Chancellor is at this time usually an ecclesiastic, commonly a bishop, and, as such, interested in, and, at least in his own opinion, a good judge of, questions of morality or "conscience." He is commonly spoken of as the keeper of the King's conscience. What can he do to help the humble suppliant? He cannot interfere directly with the proceedings of the Common Law Courts; he cannot issue a new writ which will have much chance of being held good by those courts. But he can do this: he considers the petition, or Bill, as it is called; if he thinks there is anything in the case, he issues a writ which requires the person complained against to appear, not in a Common Law Court, but before himself, and answer the petition on oath. The writ is called a *subpœna*, because it requires him to appear upon pain of forfeiting a sum of money.

When the defendant comes before the Chancellor, he will have to answer the Bill on

oath. This is very different from the Common Law procedure, which will never compel, or even allow (at that time), one of the parties to an action to give evidence; but it is a procedure, and the only procedure which is suitable for trying such questions as uses and trusts, for which no open public acts, no formal documents may be available as evidence. So, too, the Chancellor tries the whole case himself; he does not—as must be done in Common Law cases—send it to be tried by a jury. It is true that in later times particular questions arising in a case before him, suitable for trial by jury, are sometimes directed by the Chancellor to be so tried.

Suppose now that the Chancellor has decided in favour of the petitioner, has held that the land which legally belongs to the defendant ought to belong, or, 'in conscience,' in equity, morally, does belong to the petitioner. What will he do? He cannot reverse the rule of Common Law; he cannot interfere—at least directly—with proceedings in the Common Law Court; he cannot say that the legal owner is *not* the legal owner. What he can do is to say that the legal owner cannot in conscience, in equity, make use of his Common Law right for his own benefit; he must use it for the benefit of the man for whom he holds it in trust. He does not stop at saying so.

He can, if the legal owner will not act as equity and conscience dictate, punish him, if necessary, by putting him in prison. He can even indirectly, but effectively, interfere with the legal owner's attempts to enforce his legal rights by action in the Common Law Courts. He cannot forbid the Common Law Courts to try an action; but he can forbid a man to bring it, or to go on with it, or to take advantage of the judgment which he has got, and can put him in prison if he does not obey. He has the less scruple in issuing such orders because he can say that he is really doing what is in the man's own highest interests. If he is doing what is against conscience, he is injuring his soul—remember that the Chancellor is an ecclesiastic—and it is better that he should be prevented from inflicting such injury on himself.

This sort of interference, which had started as a matter of special favour in special cases, gradually becomes a regular practice. It becomes popular; uses and trusts become part of the ordinary machinery by which people deal with their property; they even lend themselves to abuse, which has to be checked by Act of Parliament in the fifteenth and sixteenth centuries. The Chancellor develops what in effect is, and comes to be known as, a court—the Court of Chancery. And then

that general principle of Equity, which began as the mere application of moral sense to particular cases, develops into more and more definite rules. If a Chancellor has decided that certain conduct in one case is against conscience, he is likely to decide that similar conduct is against conscience in another: the chances are that another Chancellor will decide the same. You get what in reality is a new set of rules of law—rules which you can rely on as likely or certain to be applied uniformly in the future. And you get a new set of rights—rights which can be enforced in the Chancellor's Court side by side with the Common Law rights, which alone can be enforced in the Common Law Courts, the former in effect, though not in theory, overriding the latter. You even get to think of two sorts of ownership. From saying that a thing ought to belong to a man, that it ought to be used for his benefit, you come to saying that it actually *is* his, "in equity" or "in conscience."

A few points in the development of Equity may be here noted. In 1535, Henry VIII struck a great blow at uses in the Statute of Uses; but it was a blow that missed its mark Under the name of trusts, equitable rights in property grow up again and flourish. From the Reformation onwards the Chancellor is

usually a layman: Bishop Williams under Charles I was the last clerical Chancellor. Again the Chancellor comes to be usually a lawyer: Lord Shaftesbury under Charles II was the last Chancellor who was not a lawyer. All this tends to create a more definitely legal character for the rules of Equity. Meanwhile Equity is adding new fields of jurisdiction. In the sixteenth century and the beginning of the seventeenth, *fraud* and *accident*—especially the accidental loss of a document—are regarded as matters peculiarly appropriate for relief in a Court of Equity—matters which a Common Law Court cannot sufficiently deal with. Mortgages form a special subject which the Chancellor deals with. A man borrows money and transfers his land to the creditor, making the creditor legally owner. He promises to pay on a definite date. If he keeps his promise, his land is to be returned to him; if not, it is to belong to the creditor for ever. Suppose by mistake or accident he fails to repay on the day named, is it fair that he should be held to the terms of the deed? Equity says no, and soon goes so far as to lay down a rule that a mortgage is a mere security for money, and something quite different from a genuine transfer of the ownership. The debtor remains in a sense owner; he has a new sort of equitable ownership,

an "equity of redemption," which he is only to lose after the court has given him ample opportunity to repay, and it becomes plain to the court that he cannot or will not pay.

In the seventeenth century the Chancery had to struggle for its life against the Common Law Courts. They resented the way in which the Chancellor interfered—in effect, though not in theory—with their judgments, by prohibiting the man who was successful at Common Law from putting them in force. A great quarrel broke out between Chief Justice Coke and Lord Ellesmere, the Chancellor: it was decided by King James I in favour of the latter. Under the Commonwealth there were proposals for reforming, and even abolishing, the Chancery. Its extraordinary jurisdiction in civil matters was compared with the extraordinary jurisdiction of the now defunct Star Chamber in criminal matters. These proposals came to nothing. It was clear that Chancery was doing work which the Common Law Courts could not or would not do, and without which men's rights could not be sufficiently protected. Equity had come to stay as part of the law of the land.

The work increases. The Master of the Rolls, who is originally a very subordinate officer, with charge of the documents of the court, comes to be at the end of the seventeenth

century a judge who can hear Equity cases, though there is an appeal from him to the Chancellor. For a long time these two between them do most of the Equity work, though the Court of Exchequer has also developed an Equity jurisdiction, an "Equity side," which, however, is abolished in 1841. Still the work is too much for the judges: the procedure is dilatory, and the court is always in arrear. At the beginning of the nineteenth century we find Lord Eldon sometimes keeping a case for ten years to think over, and not delivering judgment till perhaps most of the parties were dead and most of the property had gone in costs. Then additional judges, called Vice-Chancellors, are appointed—first one, later three. The Chancellor gradually retires from acting as judge of first instance, and reserves himself for the Court of Appeal in Chancery, when there is one established (1851), and for the House of Lords.

Finally the Judicature Acts in 1875 abolish the old Court of Chancery, as they abolish the Common Law Courts and certain other courts, and establish a new court—the High Court of Justice—which has all the powers of a Court of Common Law and a Court of Equity, and in which both sets of rules, the rules of Law and the rules of Equity, are administered; but in which, if there is "conflict or variance"

between them, the rules of Equity are to prevail. The court has now three divisions: a King's Bench Division, a Chancery Division, and a third for Probate, Divorce, and Admiralty, of which something will be said later. The King's Bench and Chancery Divisions are no longer distinct courts, though, as a matter of working convenience, matters which involve mainly Common Law come before the King's Bench; those which largely involve Equity come before the Chancery Division. But there is no hard and fast line: a plaintiff will often have a choice in which division he will start his action, and the rules of Law and Equity are equally applied in both.

4. The Main Spheres of Modern Equity. —Before discussing the effect which the Judicature Acts have had in combining Law and Equity in one court, it will be convenient to note some of the branches of Law in which Equity has made important additions to the Common Law and done work which the Common Law could or did not do.

First in the law of property. The trust is still with us. We make settlements by which we provide that property shall devolve from one person to another within the limits which the law allows, *e.g.* to a man, then to his wife, then to be divided among his children. If we are dealing with

real property in the strict sense, *i.e.* freeholds and copyholds, it is true that the trust is not necessary. Common Law will allow us to cut up a freehold estate into successive estates, each recognised by Common Law.[1] Still even there it may be useful. You may want to make sure that the legal ownership shall not vest in an infant, who would be unable to manage or deal with it; you vest it in grown-up trustees who can do so for his benefit. If you are settling a leasehold, you cannot do without the trust, because you cannot (except perhaps by will) create such successive interests in it which the Common Law recognises. You give it to trustees, who hold it upon trust for the various persons in succession. So, too, if a settlement is made of money or stocks and shares. So with mortgages. We have not yet invented a way of mortgaging property without creating equitable interests. Either the debtor conveys the legal right to a mortgagee, and retains an equitable interest—the "Equity of Redemption"—or else he retains the legal right himself, and gives an equitable interest to the lender, as by a deposit of title-deeds.

Very characteristic in connection with these equitable interests is the doctrine of notice, or, more fully, the doctrine that an equit-

[1] See Chapter V, p. 124.

able interest is good against every one who gets hold of the property, unless he has the legal ownership and acquired the property for value without notice, *i.e.* without knowledge of, and without reason to suspect, the existence of the equitable interest. Common Law knows next to nothing of notice. At Common Law either you have got no rights at all, or you have rights which are good against every one, notice or no notice. That doctrine of notice has got into the Common Law in one or two places, *e.g.* in the law about the sale of goods in market overt, and in the law of negotiable instruments; but; broadly speaking, whenever you have got rights which depend upon notice; you may be pretty sure that you are in the sphere of Equity.

Then as regards contracts. Notice, first, the doctrine of undue influence. Common Law treats a contract as voidable if made under duress, *i.e.* threats of violence to life or limb; it took no account of more subtle forms of pressure — the unfair advantage taken of a man in distressed circumstances, the influence exercised in certain relations, such as that of a guardian and his former ward, or solicitor and client. But Equity treated such pressure as a ground for holding the transaction voidable. It would not allow it to be enforced against the promisor; and

if property had been transferred, the recipient was treated as holding it for the benefit of the person who had parted with it, and as bound to restore it. So in the case of fraud and misrepresentation Equity interfered, though Common Law took account of them too. It is not clear that the rules in Common Law and Equity were quite the same on these subjects; but, at any rate, Equity had a special protection for the party who had suffered. Common Law might enable the defrauded party to resist an action brought against him on the contract; Equity could order the document to be handed up and destroyed or cancelled. That might be a necessary protection in order, *e.g.*, to prevent a cheque obtained by fraud from getting into the hands of an innocent holder, who would be in a better position than the original party to the fraud. So, too, Equity might order a document executed under a mistake to be rectified; Common Law would at most treat it as void.

Then there are the rules about time and penalties. Common Law would treat a provision in a contract as to time as being "of the essence of the contract," meaning that if a certain act was not done by one party within a certain stipulated time, he should lose all rights under the contract; Equity

treated such a provision in general as not being of the essence of the contract, but as giving a right only to damages. Again, where a contract provides, *e.g.*, that A shall pay £100 on the 1st January next, and if he does not do so, shall pay £200, Equity would not allow the £200 to be claimed, but treated it only as a security for the £100 with interest. The equitable rules about penalties were, however, to a large extent already introduced into the Common Law Courts by statutes passed at the end of the seventeenth and early in the eighteenth century.

Again, we have the rules about the assignment of rights under contract. A owes money to B. Common Law regards this as purely a relation between A and B. B agrees with C that C shall have the right to claim the debt from A. Common Law pays no attention, C cannot claim the debt. The most that can be done is that B may allow C to use his name to claim the money. But Equity treats the debt as transferable. It will compel B to let C make the legal claim in his name; in the worst case it might allow C to take proceedings in Equity in his own name against A. Thus it came to be said that "in Equity debts and choses in action are assignable."

Further, we must notice the law about

married women. Common Law put the wife, both as regards rights and liabilities, in a very subordinate position to her husband. Her tangible moveable goods simply became her husband's property. Debts due to her might be collected by the husband; and if that was done, of course the money was his. If he did not collect it, and the wife survived him, the claim for the debt remained hers. Her freehold and copyhold land, it is true, remained her own; but the husband had the enjoyment of it at least during the continuance of the marriage. Neither could dispose of the inheritance without the consent of the other. Leaseholds were in a position very much like debts. The husband had a right to dispose of them for his own benefit while he lived, and his wife had no power of disposition during that time, though, if she survived him, and they had not been disposed of, they would be hers again. Further, no married woman could make a will without her husband's consent, nor (with trifling exceptions) make any contract, except as his agent: it would have been absurd to let her contract when she had no free property out of which she could pay. But then about the end of the seventeenth century Equity invented the separate use for married women. Property might be given to a trustee upon trust for the

separate use of the married woman, free from the control and liabilities of her husband. Now, if it had simply been given to the woman, Common Law would have said, "We can pay no attention to this separate use. If it is the woman's, it comes under the husband's control, in spite of anything you say to the contrary." But then the property was not given to her; it was given on the face of it to the trustee. Common Law could not prevent the trustee employing it for the wife's benefit, and Equity would compel him to do so. And then Equity went one step further. Suppose a man who knows nothing of trusts and trustees, but has heard something of the separate use, leaves property—say £1000—to his married daughter "for her separate use." The husband pounces on it: the Common Law makes it his. But Equity will not be baulked. True, the £1000 belongs to the husband at law—there is no denying it; but Equity will compel him to apply it for the wife's benefit. Has not the testator, in fact, declared a trust in saying "for her separate use"? Nothing easier than to turn the husband into a trustee for his own wife. And so this property held for the wife's separate use comes to be her "separate estate" in Equity. Equity treats her as if she was the unmarried owner of it;

it lets her dispose of it as she pleases in her lifetime, it lets her leave it by will, it even lets her make contracts which can be enforced against it, and against it only. And then Equity gets afraid of what it has done. If the wife can so easily dispose of this property, it may be that her husband will coax or bully her into parting with it to him or to his creditors, and so it allows her a privilege which no other grown-up person of sound mind in the country can enjoy. The will or settlement may impose the restraint on anticipation. In that case, no act of the married woman is to affect her right to the capital or future income of the property. It is just because the whole of this institution of married women's property existed in Equity only that Equity could mould the institution just as it pleased.

And then, finally, look at what Equity can do for the successful plaintiff—the 'remedy,' the 'relief' which it can give him. With few exceptions the only thing that Common Law can do is to give him *money* compensation. If you have been wrongfully turned out of your land, then, it is true, Common Law will put you back into possession; but this is practically the only exception from the rule that the Common Law remedy for every wrong and every breach of contract is *dam-*

ages. With the one exception mentioned, Common Law will not order a defendant to do anything except pay money. It is a much easier order to enforce. It is easier to say whether a man has paid the money or not than to say whether he has complied with other orders; and if he fails to pay, it is easy to get the money by selling his goods, if he has any. But it is not always satisfactory to the plaintiff. It may not be money that he wants; and even if he would be satisfied with money, it may be very hard to say what would be a fair compensation for his loss, and a jury may not be the most suitable body for assessing it. Suppose a contract for the sale of land; the seller refuses to perform it. In the eye of the Common Law there is plenty of land as good elsewhere; but the purchaser has set his heart on just this piece of land, and damages (even if liberally assessed, which is not always the case) are not what he wants. Or suppose the purchaser backs out. It may be of vital importance to the seller to get the money instead of the land; but he will rarely succeed in getting more than his out-of-pocket expenses. Or suppose, again, that your neighbour has agreed with you that he will not open a public-house or carry on a school of music next door, and does and threatens to continue doing

one or the other; or that you have a right to light for your windows, and he threatens to build a building within three feet of them. In all such cases you may not be satisfied to receive even large damages for the wrong done; and what the amount of damages is to be may be very uncertain. At any rate, if damages are the only thing to be got, your wealthy neighbour might buy the right to annoy you. It was to meet cases of this kind that Equity invented the great remedies of *specific performance* and *injunction*: specific performance to compel a man actually to do what he has promised; to give you the land in return for the money; to pay you the purchase-money in return for the land; injunction to forbid him to do what he has promised not to do, or what he has no right to do; forbid him to open the public-house or the music-school, forbid him to build so as to block up your light, even compel him to pull down the objectionable wall; the last sort of injunction is called *mandatory*.

5. The Effect of the Judicature Acts. —Now, what have the Judicature Acts, 1873 and 1875, done?

(1) They have established a single court with all the powers both of a Court of Law and a Court of Equity. The distribu-

tion of work between the divisions of that court is only a matter of convenience; the King's Bench Division can never say "here a matter of Equity is involved; we cannot decide it," or the Chancery Division "this is a question of Common Law; you ought to have gone to a Common Law Court." At the worst the plaintiff who starts in the wrong division will be removed to another division, and may have to pay the expenses, if any, incurred by his mistake; but he cannot fail altogether for his mistake.

(2) Multiplicity of proceedings is avoided. Suppose a dispute about a piece of land. A is the legal owner; B has an equitable claim. Under the old system, A takes proceedings in the Common Law Courts to establish his rights; B has no defence; he must go to the Court of Chancery to get, among other things, an injunction to forbid A to go on. Under the Judicature Acts no injunction can be granted by one division of the Court against proceedings in another division; but in every branch of the court an equitable right may be directly asserted and may be pleaded as a defence to a legal claim. So, again, suppose A is blocking up B's light. Under the old system B might have had to bring two actions against A: in the Common Law Courts to get damages,

in the Chancery to get an injunction to forbid the continuance of the building. He can now get both in the same action, because the same court can both give damages and also grant an injunction. Or suppose that A has broken his contract to sell land to B; here, again, B might have had to bring one action in a Common Law Court for damages, and another in the Chancery to compel specific performance. Or, again, A has a purely legal claim against B; but in order to prove his case he wants to make B disclose facts or documents which support A's claims. There A would have had to take proceedings for 'discovery' against B in Chancery to get the disclosure, and another action in the Common Law Courts for his actual claim. He now brings an action in the High Court, in the course of which he gets an order for discovery. B is compelled to disclose the documents which he has that support A's case, and A may be allowed to administer interrogatories to B — questions in writing which B must answer also in writing but upon oath.

(3) On the other hand, the old Chancery practice which compelled B to go through the whole of A's story and give an answer upon oath to everything said in it has disappeared; the evidence in the ordinary

course is given *viva voce* in court when the trial comes on.

(4) The Acts introduced a whole code of procedure, the Rules of the Supreme Court, which in various ways assimilated the Common Law and the Equity procedure, taking the good points of both.

(5) The 25th section of the Act of 1873 dealt specially with a number of points in which there was a difference between Law and Equity, of which the following may here be mentioned:

(*a*) Mortgages. Common Law treated the mortgagee as the owner of the land in case of the ordinary legal mortgage; Equity treated the mortgagor as still being in a sense owner. It is true that it would not prevent the mortgagee taking possession, though it made his position as uncomfortable as possible if he did take possession. But suppose that, as usually happens, the mortgagor is left in possession, and that a stranger turns him out, or tries to do so. Common Law found a difficulty in protecting him against the stranger. The mortgagee would have to be joined as plaintiff. The Judicature Act decided that as against a stranger the mortgagor in possession must be treated as owner. He can sue in his own name.

(*b*) Assignment of debts and choses in

action. Here you remember that Common Law would not recognise the assignment; Equity in effect would, by compelling the assignor to lend the use of his name to the assignee for the purpose of suing the debtor, or, in the worst case, allowing the assignee to sue directly against the debtor, but requiring him, as a rule, to make the assignor a defendant. Here the Judicature Act made a definite alteration in the law. It left the old equitable assignment untouched, and it may be used still. But it created a new kind of assignment, which was a legal assignment in the sense that the assignee might sue directly in his own name without making the assignor a party; but it made certain special requirements: (1) the assignment must be absolute, (2) it must be in writing, (3) notice in writing to the debtor is required. None of these requirements exist for the equitable assignments, though notice to the debtor determines the order in which assignments take effect. On the other hand, the new kind of assignment resembles the equitable assignment in being subject to equities, *i.e.* to claims or defences which the debtor or other person might have set up against the assignor.

(*c*) The rules of Equity as to stipulations about time and other provisions which would

not be held by Equity to be of the essence of the contract, are to prevail in all cases.

(6) Finally, the 25th section contains a general provision that in all other matters where there is a conflict or variance between the rules of Law and the rules of Equity the latter are to prevail. This last provision looks so sweeping that there is a danger of supposing that it has swept away all difference between legal and equitable rights. That would be a great mistake. One might imagine, for instance, that it has turned equitable estates and rights into legal estates and rights. That is not so. The great characteristic of equitable estates, namely, that they will be destroyed if the legal estate gets into the hands of a purchaser for value without notice, still holds good. A is a trustee of property for B, *i.e.* A has a legal right which he is bound to use for B's benefit; B is said to have an equitable right to it or an equitable estate in it. Since the Judicature Act, just as much as before it, if A sells the property to C, who knows nothing of the trust, and transfers the legal ownership to him, B's rights to the property are destroyed; he can only look to A for compensation for the breach of trust. Or, again, one might suppose that this section has extended equitable doctrines to cases to

which Equity did not apply them, because they formerly never came into a Court of Equity. One might suppose that since they now come into a court with an equitable jurisdiction, the equitable doctrine must be applied. That is not so. Take the doctrine of part performance. The Statute of Frauds [1] made certain contracts unenforceable without written evidence; a Common Law Court could not enforce them. But in special classes of cases which came before a Court of Equity, especially in contracts for the sale of land, of which specific performance could be obtained, Equity held that if the contract, though not in writing, had been partly performed, as by giving and taking possession of the land, it was equitable that specific performance should be granted. In 1879 a case arose where a contract for service was made unenforceable by the statute because it was not to be performed within a year, and there was no writing. The servant was wrongfully dismissed. But there had been part performance, for the servant had actually served for part of the time. He therefore argued that he was now entitled to succeed on the equitable doctrine of part performance. He relied on this section, which says that where there is a difference between rules of Law and

[1] See Chapter VI, p. 185.

rules of Equity the latter must prevail. He failed, however. It was held that the equitable rules were not extended by the Act to cases which before the Act could not have come into a Court of Equity at all; an action on a contract of service could not have come into a Court of Equity, because specific performance of such a contract was never granted under any circumstances.

The general result of the fusion of Law and Equity has been, then, not to alter substantive law, but merely to alter and simplify the procedure. In order to find out what the substantive law is, we must still go back to the time when Law and Equity were administered in different courts; we may still have to picture to ourselves distinct proceedings taken about the same matter in those courts, and work out the result of those separate proceedings.

CHAPTER III

PROBATE, DIVORCE, AND ADMIRALTY

THERE are three minor bodies of law, Probate, Divorce, and Admiralty, which were developed in jurisdictions distinct from the Common Law Courts and the Court of Chancery. In these we see more influence of foreign law than elsewhere in our legal system.

1. THE CHURCH COURTS.—From William the Conqueror onwards the Church Courts are separated from the Lay Courts: the Bishop has his court; the Archbishop a superior or prerogative court; from him before the Reformation there is an appeal to the Pope. The law of these courts is the Church or Canon Law—the Common Law of the Western Church. That law was formed by ecclesiastical lawyers who knew the Roman law. It was first systematised by Gratian of Bologna in the twelfth century. It was the law of the Church in England, as in other parts of Western Europe, though within limits local and provincial variations were possible. These courts were treated by the

King's Courts as subordinate, in the sense that the King's Courts could issue prohibitions to prevent them from dealing with matters that did not concern them. In spite of this they acquired and kept for themselves a large sphere of jurisdiction. With a great part of the matters with which they dealt we have not much concern. Their exclusive claim to punish clergymen for ordinary offences has long since disappeared; the power to try and punish laymen for immorality has become practically obsolete; their jurisdiction over strictly ecclesiastical offences of clergymen, such as heresy and ritual, still remains and is still exercised by them. In the struggle between them and the King's Courts for jurisdiction over ecclesiastical property—the right to present a clergyman to a living, for instance—the King's Courts were successful at an early time in getting and keeping the jurisdiction in their own hands. But in two matters which concern primarily what we should consider the civil rights of every one, the Church Courts long retained their jurisdiction: the disposition of the goods of the dead, and questions of marriage and divorce

2. Probate and Administration. — As regards the real estate of the deceased, it is settled by our early Common Law that he

can make no will, except where there is a local custom to that effect. But as regards his goods and chattels, which include his leaseholds, it is early admitted that he has at least a limited power to dispose by will —limited because his wife and children may have rights which he cannot override. If he makes no will, we can hardly say that there is in early times any common law how his goods shall be divided; much or all will depend on local custom. The Common Law takes little interest in the goods, which are of far less importance, and especially of far less public importance, than the land. Now the Church has a definite interest in the goods of the deceased. The religious belief of the time requires at least a substantial part of his property to be devoted to the good of his soul. If he makes a will, as most men do, it is almost certain that he will set apart a considerable proportion for the saying of masses; if he should neglect to do so, and in the twelfth and thirteenth centuries it is regarded as almost a sin to die without making a will, the Church ought to make the provision which he has failed to make for his soul. Thus the Church Courts assume a jurisdiction over dead men's goods. If there is a will—and wills at that time are very easy to make, mere word of mouth is

sufficient—the Bishop's Court is the proper place in which it must be proved; the Bishop's Court will see that the executor carries out his duties properly. If there is no will, then the Bishop will take charge of the goods that he leaves, and make a suitable disposition of them. He seems to have had a wide discretion, which was not always well exercised. Two statutes provided a remedy. In 1285 the "Ordinary," *i.e.* the ecclesiastical superior who has the jurisdiction, is required by statute to pay the debts of the intestate, just as the executor, (*i.e.* the person appointed by the will to carry out the will) is required to pay them. In 1357 he is required by statute to entrust the administration of the property to the near relations of the deceased. Then we get the office of *administrator*. The administrator is the person who, in the absence of an executor, must deal with the deceased's property, pay his debts, and make a proper division among those entitled. He receives what are called *letters of administration*, which give him the title to the property; even where there is a will, but no executor is appointed, there must be a grant of letters of administration *cum testamento annexo*, "with the will attached."

It is true that the Ecclesiastical Court is

not the only one which deals with the goods of dead men ; the executor or administrator may have to sue in the Common Law Courts to recover the claims or property of the deceased, and the deceased's creditors can sue him there. But neither the Ecclesiastical Courts nor the Common Law Courts are well adapted to settle the numerous conflicting rights of creditors, legatees, and next of kin ; trusts are often involved, and during the last two centuries the most effectual and usual method of asserting a claim to or against the estate of a deceased person is to get the estate administered in Chancery. That Court tells the executor or administrator what to do, or takes the whole estate under its charge and distributes it. But all this supposes that there is already a will proved, or letters of administration granted by the Ecclesiastical Court. Without probate of the will or letters of administration, neither executor nor administrator can take any steps in any other court of law, for the executor's proof of his title, and the administrator's title itself can only be given by the Ecclesiastical Court. That court keeps the key which unlocks the estate. The Reformation left the jurisdiction untouched. The Statute of Distribution, 1670, established a code for the distribution of the property of

intestate persons, modelled largely on the Roman law. Local customs which gave rights to wife and children which could not be overridden by will were to a great extent removed in 1692 and finally swept away in 1857.

The system lasts into the middle of the nineteenth century. There are as many Probate Courts as there are dioceses, in addition to the Prerogative Courts of the two Archbishops, and a number of courts in places called Peculiars, places outside a bishop's jurisdiction, and under a special ecclesiastical jurisdiction of their own. If a man left property in different dioceses, you might have to apply to the court of each diocese, unless you took what was the better course, namely, to apply to the Prerogative Court. The records of these numerous courts were often badly kept, and there might be damage or loss of the original wills which the courts kept under their custody. In 1857 the whole of the jurisdiction of the Ecclesiastical Courts in Probate and Administration was taken away and was vested in a new court—the Court of Probate.

3. Marriage and Divorce. — This also, from an early time in the Middle Ages, fell largely into the hands of the Ecclesiastical Courts. They assume a jurisdiction to declare

whether a marriage has taken place or not, whether there is any impediment which makes it void or voidable. Questions of legitimacy may also be decided by them. They grant also what is called a divorce *a mensa et thoro*, or rather what we should call a judicial separation, *i.e.* they release the parties from the duty of living together on grounds of cruelty or misconduct; but a divorce in the modern sense, which allows the parties to marry again, is not recognised by the medieval church in the case of any marriage which is originally valid. After the Reformation it looks for a moment as if the Ecclesiastical Courts would allow even a divorce in the modern sense; but the attempt fails, and the only way of getting a complete dissolution of marriage is by special Act of Parliament (as is still the case for people domiciled in Ireland). This Divorce Act was only allowed after proceedings had been taken both in the Ecclesiastical Courts for separation, and in the Common Law Courts for damages. The expense of these combined proceedings was enormous, and made divorce a luxury of the very rich.

Here again, in 1857, statute took away the whole of the matrimonial jurisdiction from the Ecclesiastical Courts and vested it in a new court, the Divorce Court, which was

enabled to do not only everything that the Ecclesiastical Court could have done, but also what previously needed the combined efforts of the Ecclesiastical Courts, the Common Law Courts, and an Act of Parliament.

4. ADMIRALTY.—The Middle Ages knew of a number of courts with a commercial and maritime jurisdiction, dealing with commerce and shipping, mainly local courts, *e.g.* in the Cinque Ports. It knew of a Law Merchant which was different from the Common Law and had an international character, a law founded on the custom of merchants and seafaring men of all nations. Gradually these courts decay, partly owing to the encroachment of the Admiralty, partly owing to the jealousy of the Common Law Courts, which interfere with them and extend their own jurisdiction. In the course of the seventeenth and eighteenth centuries the Law Merchant, apart from maritime law, is absorbed into the Common Law; thus the law of such matters as Bills of Exchange comes to be part of the law of the land, and comes to have a specially English character. On the Continent mercantile law is still regarded as something separate from the ordinary law.

The Admiral whose office dates from the end of the thirteenth century has at first no jurisdiction apart from the discipline of the fleet,

but in the course of the fourteenth century we find him assuming a jurisdiction to punish crimes, such as piracy, committed at sea, as well as a civil jurisdiction over shipping and commercial matters. The law and procedure of his court has an international rather than a purely English character; it administers a law which is to be found in the medieval maritime codes, such as the Laws of Oleron and the so-called Law of Rhodes: in the background, as a supplementary law, is the Civil or Roman Law. Its procedure is that of Roman Law: the parties can be examined on oath. But the Admiralty Court also suffers from the jealousy of the Common Law. Its criminal jurisdiction is, in the sixteenth century, vested in a set of commissioners who come in practice to be invariably judges of the Common Law Courts. Its civil jurisdiction was encroached upon, as contracts made and wrongs done abroad or at sea were brought within the jurisdiction of the ordinary courts by fictions, such as that Bordeaux was in Cheapside. Prohibitions were issued to prevent the Admiralty from dealing with any case that the Common Law Courts could deal with.

The result of this struggle, which lasted through the sixteenth and seventeenth centuries, was to confine the court to a very limited

jurisdiction, dealing with purely maritime matters, such as salvage and damage by collision at sea. It still retained such jurisdiction, and received some increase and confirmation of it in the nineteenth century. The Maritime Law which it administered—though it gradually became more English and less international — still retained a peculiar character. It is, for instance, still the rule, in the case of collision at sea, that contributory negligence [1] does not deprive a plaintiff of his remedy altogether as it does at Common Law, but the loss is equally divided.

The Acts of 1857 which established the Probate and Divorce Courts provided that the ordinary judge of these courts should be the same person as the Admiralty judge. Thus it was a natural step that in 1875 the Probate, Divorce, and Admiralty jurisdictions should be entrusted to a single division of the High Court.

[1] See Chapter VII, p. 208.

CHAPTER IV

PERSONS AND PERSONAL RELATIONS

1. Unborn Persons.—Even before birth a human being is not without legal recognition. The ante-natal life is protected by stringent provisions of the criminal law, and an ancient rule postpones the execution of a woman with child till she has been delivered. The Irish courts have held that a child which was born deformed in consequence of an injury to its mother, caused by the fault of a railway company on whose line she was travelling, could not recover damages; but the decision turned on the view that the company, not having means of knowledge of its presence, owed no duty towards it, and it is not clear that under no circumstances could damages be recovered for such injuries.

In the law of property, a child conceived, but not yet born, will be treated as born, at any rate where it is for its advantage that it should be so treated. For instance, even a bequest to persons "born previously to the date of my will" will include a person born within

due time afterwards. But if the child is never born alive, things will remain as if it had never existed. Further, by wills and settlements, provision may be made for those who may come into existence at a future time, subject to rules restricting the indefinite tying up of property, the most important of which — the "rule against perpetuities" — forbids any disposition which is not certain to take effect (if it takes effect at all) within lives in being and twenty-one years afterwards.

2. INFANTS.—At birth a child enters the condition of infancy — a condition which ceases at the age of twenty-one years, or, rather, at the first moment of the day preceding the twenty-first birthday. In what follows the term "infant" will be used in its strict sense of a person who is in the condition of infancy as above defined. It would be a mistake to regard the condition of infancy as one of uniform incapacity throughout and for all purposes. In Criminal Law the material periods are those up to seven and between seven and fourteen years. A child under seven incurs no criminal liability for its acts; a child over seven, but under fourteen, incurs no such liability, unless it is shown that it had sufficient capacity to know that its act was wrong. A person above the age of four-

teen, though under twenty-one, does not differ in general as regards criminal liability from a person of full age, though modern legislation has made special provision for the trial and punishment of persons under sixteen. The marriages of boys over fourteen and girls over twelve, if duly celebrated, are completely valid, and the only check on such marriages without the consent of parents or guardians is the difficulty of getting them celebrated by the clergyman or proper officer without making a false declaration, which involves penal consequences. Even marriages at an earlier age were once common, and are still legally possible; but such a marriage would not be binding unless affirmed when the age of fourteen or twelve, as the case might be, was attained.

There is no general rule which exempts infants from liability for "tort," *i.e.* civil injury other than breach of contract or trust. An infant who damages another by carelessly running into him on his bicycle is liable just as a person of full age would be. Practically, the liability is not often of much value to the injured person, for the infant probably has no property available to satisfy it, and his parents are not liable for his acts. In two ways, however, the liability of an infant for civil wrongs is restricted. It sometimes

happens that the wrong is so closely connected with a contract that the enforcement of liability for the wrong would in effect amount to an enforcement of the contract. An infant who has hired a horse injures it by careless riding. In such a case an adult might be held liable either for breach of his contract to use proper care or for a wrong independent of the contract; an infant has been held not to be liable at all. Again, some wrongs, such as fraud, in their essence involve a guilty state of mind, and in such cases the extreme youth of the wrong-doer may be inconsistent with the existence of such a state of mind.

It is in respect of property and contract that the incapacity of infancy has its most general operation. This incapacity is a one-sided one. Property may be transferred, binding promises may be made to an infant, but in general he is unable to make a binding disposition of his property or to make binding promises to others. As regards property, it should be noticed that law and practice, to a large extent, make it unlikely that property of any considerable value will come into the direct ownership of an infant. When property passes on death, it will go in the first instance to the executor appointed by will, or the administrator appointed by the court and

charged with the duty of dealing with it and transferring it to the persons entitled. Similarly, under the settlements which people of property commonly make, the property will be in the hands of trustees. The infant cannot give a receipt which such persons can safely take, and they must therefore retain the property to which an infant is entitled till he attains full age, and meanwhile deal with it under the directions of the will or settlement or under the orders of the court. In some cases they may relieve themselves by transferring it into the control of the court.

Where an infant actually has in his hands tangible moveable property, it would seem that he has a power of disposing of it, of which the limits—if such there are—have not been determined. It cannot be supposed, for instance, that a sale by an infant of years of discretion of his books or personal effects could (in the absence of fraud or unfair dealing) be called in question. It is clear that a payment made by him for goods bought is binding, though payment could not have been enforced against him. A gift of a large sum of money by an infant was after her death held valid. But the bulk of "property," in the modern sense of the word, is not of this kind. Land can only be disposed of by sealed

writing; and a writing or a sealed writing is necessary for the transfer of such things as stocks and shares, claims against debtors, and interests in property held by others upon trust. In all such cases the rule would seem to apply that the infant's acts are "voidable"; they become binding on him only if, after attaining full age, he fails within a reasonable time to repudiate them. The rule has been relaxed so as to enable infants—if male, at the age of twenty, and if female, at the age of seventeen—to make a binding settlement of their property upon marriage, but only with the sanction of the court.

With the exception of soldiers on active service and mariners while at sea, no infant can dispose of his property by will. But in some cases a person of the age of sixteen can make what is in effect equivalent to a disposition by will: a member of a Trade Union or Friendly Society may, for instance, at that age nominate in writing a person to receive moneys payable on his death by the Union or Society.

The contracts of an infant were at Common Law voidable. But in this connexion the word "voidable" has two senses. In the case of contracts creating continuing or recurrent liabilities incident to the disposition or holding of property, such as a settlement or a leasehold tenancy, the infant, on attain-

ing full age, became bound unless within a reasonable time he took steps to repudiate liability. In all other cases—as, for instance, a sale of goods or a contract for services or a loan of money—the contract was voidable in the sense that the infant would not, on attaining full age, become liable unless he took steps to ratify it. As regards this latter class of contracts, the Infants' Relief Act, 1874, has very much altered the law. Contracts for the loan of money and supply of goods to infants and "accounts stated" with infants are made altogether void, while the possibility of ratification is taken away from all contracts; and even a new promise to perform the contract, whether made upon a fresh consideration or not, cannot be enforced by action. Whether an infant has now any right under a contract which the Act declares void is not clear; but in other cases it is certain that he may still sue an adult upon a contract (*e.g.* mutual promises of marriage) which is unenforceable against the infant and incapable of ratification by him.

To the general invalidity of infants' contracts the Common Law recognised the exceptions of contracts for necessaries and contracts for the infants' benefit, and these exceptions are not affected by statute. Contracts for necessaries include contracts

for such goods, lodging, and instruction as are reasonably necessary for the infant, having regard to his station in life and his needs at the time of the contract. The party who supplies the infant does so at his peril; it will not avail him that he did not know that he was dealing with an infant, or that he thought that his position in life was such as to make the goods necessary, or that he did not know that the infant was already sufficiently supplied. Of contracts for the benefit of the infant, so far as they do not coincide with contracts for necessaries, a contract for the employment of the infant, where his position in life makes employment desirable for him, is a typical case.

3. Parents and Guardians. — In some systems of law the disability of persons under full age is helped out by the powers of the parent or guardian, who can represent the child, and, by acting on his behalf or giving concurrence to his acts, can make dispositions of his property and contracts binding on him. Of such an institution we see but the rudiments or isolated survivals in English law. Our medieval law of guardianship was concerned mainly with infants who were heirs of land; and though the "guardian in socage" —the nearest relation of the infant to whom the infant's land cannot descend—has not

been abolished, the practice of settlement and of appointing trustees in whom the land, or at least powers over it, are vested, has in practice rendered rare the occasions on which the very limited powers of such or any kind of guardians can be exercised over an infant's land. Over other property of an infant, neither parents nor guardians have now—if they ever had—any effective powers, except such as a will or settlement or an order of the court may give them; they cannot, for instance, give a valid receipt for a legacy or money payable to the child. For purposes of litigation, it is true, an infant can and must be represented by an adult, who will be called "the next friend" of an infant plaintiff, the "guardian *ad litem*" of an infant defendant; but such a next friend or guardian represents the infant only for the purposes of the particular lawsuit, and is not necessarily, though he is commonly, the infant's parent or general guardian.

Broadly speaking, then, the powers and duties of parents and guardians relate not to property, but to the care and custody of the infant's person. The father is, in the first instance, and to the exclusion of the mother, entitled to the control and custody of the infant child, and is at the same time liable for its maintenance—a liability, however, which can

be effectively enforced only by the machinery of the Poor Law. A mother who is a widow or has separate estate is under the like liability, and in case of need children are similarly bound to maintain their parents. The father cannot by agreement deprive himself of his right, except in the case of a separation agreement between husband and wife; and even such an agreement will not be enforced by the court if the court considers it not to be for the child's benefit. Upon the father's death the mother will, under comparatively recent legislation, become guardian of the child, though jointly with any guardians appointed by the father by deed or will. The mother may similarly appoint guardians; but a guardian appointed by her cannot act until after the death of both parents, and then jointly with any guardian appointed by the father. The court has always had power to take a child out of the custody of a parent—even a father—or guardian in cases of misconduct or unfitness, and in such cases, or in the absence of any lawful guardian, to appoint a suitable person as guardian.

The powers of parents and guardians include the power of administering reasonable punishment, and such a power may be delegated by them to others, such as school-

masters, under whose control the child is placed.

4. Legitimacy. — Broadly speaking, one may say that every child is legitimate which is born during the continuance of a marriage or within due time afterwards. The presumption that the husband is the father of his wife's children is one that can be overthrown only by evidence of the most cogent, though not of the most direct, kind. The rule adopted in most countries that an illegitimate child is made legitimate by the subsequent marriage of its parents has never been followed in England. On the other hand, legitimacy is with us, owing to the complete freedom of will-making, a matter of less importance than elsewhere. Yet even under a will illegitimate children or relations may fail to obtain what was intended for them, since words such as "children" will be taken to refer to legitimate relationship only, unless there are circumstances or expressions inconsistent with such an interpretation. Where there is no will, illegitimate children or relations are excluded from the succession altogether. The mother of an illegitimate child is entitled to its custody to the exclusion of the father, and is primarily liable for its maintenance, though, upon application to a court of summary jurisdic-

tion and sufficient proof of the paternity, she can compel the father to make a limited contribution until the child reaches the age of sixteen. Under the Workmen's Compensation Act, 1906, illegitimate relations are included among the dependants who are entitled to claim compensation for the death of a workman caused by accident.

5. Married Women.—Women, though, for the most part, excluded from public functions, are not by reason merely of their sex in a substantially different position from men as regards criminal liability, property, and contract, if we except the rule which prefers males to females in the succession to real estate on intestacy. A married woman, on the other hand, has at Common Law a very peculiar status involving both disabilities and privileges. Even now the rigour of the criminal law is relaxed in her favour by the presumption that, when she commits theft and some other offences in her husband's presence, she is presumed (unless the contrary is shown) to have acted under his compulsion; she does not become an accessory after the fact by assisting her husband to escape punishment for a felony which she knows him to have committed, and it is only within certain limits that husband and wife can be received or compelled to give evidence

against one another in criminal proceedings. Husband and wife cannot even now recover damages against one another for torts, except in respect of property.

An account has already been given of the proprietary and contractual disabilities of married women at Common Law and the creation by the Court of Chancery of an equitable separate estate which a married woman can freely deal with and bind by her contracts, so far as no restraint on anticipation has been imposed, and which, in any case, she can dispose of by will. But this equitable separate estate existed only where it was created by a will or settlement, or in the comparatively rare cases where the Court of Chancery exercised its jurisdiction to compel a husband to make a settlement upon his wife. Married women of the classes in which settlements and elaborately drawn wills were unknown thus remained subject to the Common Law. A half-hearted step towards the creation of a separate estate in the earnings of married women and small properties coming to them on intestacy was taken by the Legislature in 1870. It was not until 1882 that Parliament revolutionised the law by providing that women married after that year should hold all their property as separate estate, with full power to dispose

of it in their lifetime or by will and to make contracts binding it. The same provision applies to property subsequently accruing to women previously married. The result is that at the present day an English married woman, as regards her property and power to contract, enjoys a complete independence of her husband, and is in a far better position, if she has any considerable property, than she would be under such a system as the continental "community of goods." At the same time, the effect of existing and future settlements has not been interfered with, and a married woman may still enjoy the unique privilege of the restraint on anticipation.

The husband will be presumed, in the ordinary case where husband and wife live together, and she provides for the needs of the household, to have authorised her to pledge his credit for that purpose, unless he has supplied her with sufficient ready money. Where he has left her destitute, she is entitled as an "agent by necessity" to contract on his behalf—though it may be against his will—in order to meet the needs of herself and children living with her. But there is no general rule that the husband is liable for his wife's debts. The husband may, for instance, decide that the needs of the household shall be provided for by a housekeeper, and that

the wife shall have no authority to contract on his behalf. And the tradesman who supplies goods to a married woman without inquiry is not entitled to assume that she has her husband's authority. It is only when the husband, by meeting the liabilities which his wife has incurred (whether for necessaries or not) to a particular tradesman, has "held her out" as his agent that the tradesman is entitled to hold the husband liable until he has received notice to the contrary. The notice sometimes published in the papers to the effect that Mr. Smith will no longer be liable for his wife's debts has a much more limited operation than is generally supposed. It is unnecessary as regards persons whom the husband has not by his previous conduct induced to look to him for payment; it is ineffectual as regards those who do not happen to see the advertisement. Another risk run by the tradesman who deals with a married woman, is that he may find that though she has a sufficient separate estate her husband is insolvent. In such a case, if it appears that the wife was acting on behalf of her husband, even in matters of her own personal adornment or luxury, she incurs no liability, though the tradesman who did not make inquiry thought that she was dealing on her own behalf.

Liabilities for contracts and torts incurred by a married woman before marriage are binding on her separate estate, but they also bind her husband to the extent of any property which he may have acquired from her, as under a marriage settlement. Torts committed by the wife during marriage not only bind her separate estate, but impose an unlimited liability on the husband during the continuance of the marriage, with the exception that he cannot be made liable for a wrong so connected with a contract of the wife, that the enforcement of the liability would in effect be an enforcement against him of the contract.

6. Marriage and Divorce.—Historically there seems to be no doubt that the English Common Law required nothing for the celebration of a marriage beyond the declared agreement of the parties, which might take the form either of a declaration of present intention, or of a promise to marry followed by actual union. This was the general law of Western Europe in the Middle Ages, and such marriages are still possible in Scotland. The House of Lords, however, in the nineteenth century decided in an Irish case that the Common Law had always required the presence of an ordained clergyman. The question is now for England an academic one; for statutes,

of which the first was passed in 1753, have long since prescribed the formalities necessary for a valid marriage. A marriage must be celebrated either in the presence of a clergyman of the Church of England, or (since 1836) of a Registrar of Marriages, or (since 1898) of an "authorised person" who is usually the minister authorised by the trustees of a Nonconformist place of worship. Two other persons must be present as witnesses. The celebration must be preceded by the publication of banns or the obtaining of a Registrar's certificate or a Bishop's or Registrar's licence, and, unless a special licence is obtained from the Archbishop of Canterbury, must take place in a recognised place of worship or registrar's office situate in the district in which one at least of the parties resides. The marriages of Jews and of members of the Society of Friends are exempt from these provisions, and may be celebrated according to the rules of these religious bodies. In any case provision is made for preserving a record of every marriage celebrated in the country.

A marriage is void on the ground of nearness of relationship if it is entered into (1) between ascendants and descendants, *e.g.* parent and child, grandparent and grandchild, (2) between brother and sister, uncle and niece, nephew

and aunt, (3) between persons who, by reason of the previous marriage of one of them, are related in a way corresponding to one of the relationships above mentioned, except in the case of a marriage between a man and his deceased wife's sister, which was legalised in 1907. Thus marriages between stepson and stepmother, between a woman and her deceased husband's brother, between a man and his deceased wife's niece are all prohibited. But the relations by blood or marriage of a wife are not regarded as being related to the relations of her husband; thus if A and B are two brothers and C and D two sisters, the marriage of A with C will be no bar to the marriage of B with D.

A marriage celebrated between two persons, one of whom is at the time validly married, is in any case void; and a married person knowingly entering into such second marriage is guilty of bigamy.

Apart from the setting aside of a marriage on the ground of mistake as to the nature of the transaction or of insanity or physical incapacity existing at the date of the marriage, a marriage duly contracted can be dissolved by the court only on the petition of one of the parties who proves the sexual misconduct of the other. Adultery on the part of the wife will by itself entitle the husband

to a divorce; a wife can obtain a divorce only if she proves, in addition, cruelty, desertion, bigamy, or certain other aggravating circumstances. Where there has been misconduct on both sides, the court will usually refuse to grant a divorce, though it has in exceptional circumstances granted one to the less guilty party. Either adultery, cruelty, or desertion alone is sufficient to entitle the petitioner to a judicial separation. This does not, like a divorce, enable the parties to marry again, but it releases them in other respects from the duties of married life, and puts the wife, for the purposes of property and contract, in the position of an unmarried woman. Upon a decree for dissolution of a marriage or judicial separation, the court may make orders for the custody, maintenance, and education of the children, for alimony to be paid by the husband to the wife, even if she is the guilty party, and for varying marriage settlements.

The fact that divorce, while it is in theory a punishment for the guilty party, is in many cases equally desired by both parties, makes it probable that there will often be collusion between them. For this reason an interval of six months elapses between the decree *nisi*, which is made upon the hearing of the case, and the decree absolute, which finally dis-

solves the marriage and enables them to marry again. During this interval any person may intervene to show cause, on the ground of collusion or the suppression of material facts, why the decree should not be made absolute, and a public officer, the King's Proctor, is specially charged with the duty of intervening.

7. Insanity.—The nature and degree of insanity which will afford a defence to a criminal charge has from time to time been a matter of considerable discussion. What is still in theory the accepted legal view regards insanity as a matter of delusion rather than impulse or absence of self-control. According to this view, an insane person is criminally liable unless he was so insane as either "not to know the nature and quality of the act he was doing," or "not to know that what he was doing was wrong." But there is high authority for holding that uncontrollable impulse may be a sufficient reason for treating acts done under it as exempt from criminal liability, and in practice it is believed that this view is largely acted upon. When a jury is satisfied that the act was committed, but that at the time the accused was so insane as not to be legally responsible, it brings in a special verdict to that effect, and the accused is ordered to be detained during

the King's pleasure. The effect of this sentence is a detention at Broadmoor, which is usually lifelong, and for this reason insanity is not often pleaded, except as a defence to a prosecution for murder.

As regards civil rights and liabilities, insanity has a much more retricted operation. A marriage contracted by a person so insane at the time as not to appreciate the nature of the obligations of the married state may be set aside at the suit of either party. The marriage of a person who has been judicially declared insane is totally void, and the same is said to be true of any disposition of property made by such a person. In general, however, the contract of a lunatic is fully binding on him unless the other party was aware that he was so insane as not to understand the nature of the transaction. If these conditions are satisfied, the lunatic, on recovering his sanity, or those entitled to act on his behalf, may repudiate or confirm and enforce the contract. For wrongs a lunatic appears to be liable, unless the lunacy excludes some specific state of mind which forms an essential part of the wrong.

Drunkenness due to one's own fault is in itself no defence to a criminal charge; it may, however, be material as showing that the accused had not an intention—*e.g.* an

intention to murder—which forms part of the essence of the crime charged. Involuntary drunkenness and mental disease caused by drunkenness is in criminal law treated as on the same footing with insanity. In the matter of contract, drunkenness is regarded as having the same effect as insanity.

8. The Crown and its Servants.—The King, whether in his public or private capacity, is incapable of incurring liability, and no proceedings by way of action or prosecution can be taken against him. Nevertheless, a proceeding known as a "petition of right" is allowed, nominally as a matter of grace, in practice as a matter of course in all proper cases, by which property and compensation for breach of contract (but not for tort) may be recovered from the Crown. The scope of this proceeding (which in its later stages takes place before the ordinary courts and resembles an ordinary action) is limited by the fact that employment in the service of the Crown is (with certain exceptions) terminable at the pleasure of the Crown. On the other hand, servants of the Crown, from the highest executive, administrative, or military officers downwards, enjoy no general immunity for their public acts from either civil or criminal proceedings, and the command of a superior, even the command

of the King, is no defence to any such proceedings. It is, of course, true that such officers in many cases have powers which enable them to do lawfully what a private person might not do, but the question whether their acts are justified by their powers must be decided in proceedings before the ordinary courts. A servant of the Crown is not himself liable for contracts made by him on behalf of the Crown, nor is he liable as a principal for the acts or defaults of his subordinates unless expressly authorised by him.

Judges enjoy an almost complete immunity in respect of acts—even corrupt and malicious acts, happily rare in our history—done by them in their judicial capacity. A judge of an inferior court, in order to entitle himself to this immunity, must, however, show that in reality, or at any rate upon the facts disclosed to him, he had jurisdiction in the matter in question.

Foreign sovereigns and the ambassadors of foreign states are exempt from the jurisdiction of the English courts unless they voluntarily submit themselves to it.

9. Nationality and Domicile.—Aliens, *i.e.* those who are not British subjects, are excluded from public office and public functions such as the parliamentary franchise. They have no enforceable right to enter

British territory, and recent legislation in some cases authorises the Government to take steps to exclude and even to expel them from the United Kingdom. In other respects, if we except certain provisions of the criminal law which are applicable only to British subjects, and the rule that an alien cannot own a British ship or a share in one, the legal position of an alien does not differ substantially from that of a British subject. The rule that an alien could not hold land in England was abrogated in 1870.

British nationality is acquired at birth by those born on British territory, irrespective of parentage, as well as by those born elsewhere, who are the issue of a father or grandfather (in the male line) who was born on British territory. A person who acquires British nationality at birth is a "natural born" British subject. A naturalised British subject is one who acquired British nationality by naturalisation, which can be granted by a Secretary of State. An alien who asks to be naturalised must have resided in the United Kingdom or have been in the service of the Crown for not less than five years, and must take the oath of allegiance.

A woman acquires by marriage the nationality of her husband.

British nationality may be lost by naturalisa-

tion in a foreign country, or in the case, which sometimes occurs, of double nationality, by making a declaration of alienage: the child born in England of a French father, for instance, is both a British subject and a French citizen.

More important for most purposes of private law than nationality is domicile. The question, for instance, whether the goods of a person who dies intestate ought to be divided among his relations according to the rules of English or of some foreign law, will be decided by an English court, not according to the nationality but according to the domicile of the deceased at the time of his death. A person's domicile is the country which is in fact or in the eye of the law his permanent home for the time being. Seeing that our law refuses to contemplate the possibility of any person either being without a domicile or having more than one domicile, the rules on this subject are not only intricate but highly artificial. We may note that every person is considered to start life with a "domicile of origin," which will be, as a rule, the domicile of his father at the time of his birth: that this domicile of origin continues until it is shown that some other domicile has been acquired, and is restored whenever an acquired domicile is lost without

the acquisition of another, and that the domicile of a wife is necessarily the same as that of her husband. The substitution of nationality for domicile in cases like that mentioned, which has been made in the law of some foreign countries, even if desirable on general grounds, would not solve the questions which arise when the laws of different parts of the same national territory, *e.g.* of England and Scotland, or of two of the United States of America, come into competition. On the other hand, it will be seen that a pretty problem arises when the test of domicile refers the English courts to the law of a country which applies the test of nationality, and it happens that the nationality of the person in question was British.

10. Corporations. — Bodies or groups of human beings may have legally recognised rights and duties, which cannot be treated as the rights and duties of the members. Such bodies are known as corporations, or (to distinguish them from the corporations sole, to be mentioned later) corporations aggregate. The marks of a corporation are: perpetual succession, *i.e.* the death or withdrawal of members, the addition of new members from time to time, does not impair the continuity and identity of the body, "in like manner," as Blackstone says, "as the

river Thames is still the same river, though the parts which comprise it are changing every instant"; the use of a common seal as evidence of at least the more formal acts of the corporation, and the capacity to sue and be sued by its corporate name. The legal recognition of corporate character may be obtained either by a charter from the Crown, as in the case of most of our older corporations, like municipal corporations, universities and their colleges, as well as of some more recent ones; or directly by means of an incorporating Act of Parliament, as in the case of Railway Companies; or indirectly through an Act of Parliament like the Companies Act, 1908, which offers corporate character to any number of persons (usually not less than seven) associated for a lawful object, who are willing to comply with the statutory requirements as to registration and otherwise.

As a being capable of having legal rights and liabilities, a corporation is a person in the eye of the law. So far as English lawyers have theorised about the nature of corporate personality at all, they have till recently for the most part accepted the doctrine of the Canon Law, that such personality is a mere fiction of the law with no basis in fact. But during the last ten years a belief has steadily

been gaining ground that such personality is real and is analogous to the personality of individuals. It is impossible here to enter into the details of this controversy, but it may be noticed that—(1) the "fiction" theory must remain unsatisfactory unless it can explain what are the real facts in terms of individual rights and duties which underlie the fiction, and this it seems unable to do. It does not seem possible to explain away the legal rights and duties of a body as being merely the rights and duties of the individuals composing it; and (2) the notion of a corporate personality is not confined to law. We habitually think of the actions of nations and of societies as distinct from the actions of the individuals composing them, and we attribute moral qualities to such actions, and moral rights and duties to nations and societies.

The legal capacity of corporations differs in some respects from that of individuals, partly from the nature of the case, partly as a consequence of the theory that their personality is a fictitious one. It is obvious, for instance, that they cannot enter into family relations. For the most part the criminal law has no application to them, if we except some proceedings which are at least in form criminal, like the indictment of a public body for failing to repair a highway. On the other

hand, a corporation can own property; it can acquire rights and make itself liable under a contract; it can be a trustee; it can incur civil liability for wrongful acts, and even for those which involve a definite state of mind like fraud or malice.

For the making of contracts by a corporation the Common Law required a document under the corporation's common seal, except in matters of trifling importance or daily necessary occurrence. Even apart from such exceptions, however, a contract not made in the required form, but completely performed on one side, might be enforced. The Common Law rule has been practically destroyed in the case of Companies formed under the Companies Act, 1908, and similar earlier Acts, by a provision which enables them to contract through an agent in the same form in which an individual might contract.

Of greater importance is the doctrine of *ultra vires*, which limits in point of substance the transactions into which a corporation may enter. A Common Law corporation (*i.e.* one created by Charter from the Crown), it is true, is presumed to have the contractual capacity of an individual. *Prima facie* such a corporation has the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts

as an ordinary person can bind himself to. Even if the charter should contain restrictions on its freedom of action, acts transgressing such restrictions are probably not void, though they may be a ground for revoking the Charter. On the other hand, a corporation created by or in pursuance of an Act of Parliament is subject to the rule that it has only such powers as are expressly conferred or are necessarily or reasonably incident to the fulfilment of the purposes for which it is established. Acts done in excess of such powers are legally void, and will if necessary be restrained by the courts. Thus a company directly created by special Act of Parliament will be restricted to acts necessary or reasonably incident to the objects specified in the Act. A company formed under the Companies Act, 1908, is similarly confined to the pursuit of the objects stated in the memorandum of association which is signed by its first members at the formation of the company, and which cannot be altered except with the sanction of the court. This rule may serve a number of purposes. It may prevent extraordinary powers like that of compulsorily acquiring land from being abused for unauthorised purposes; it may prevent a corporation constituted for purposes of public utility from endangering those purposes by engaging in

other activities; it may protect the creditors of a company from the dissipation of the company's capital, to which alone, in the case of a limited company, they can look for payment, and the members from seeing their contributions applied to purposes for which they did not bargain.

In addition to corporations aggregate, English law attributes a continuous legal personality under the name of "corporations sole" to the successive holders of certain offices, especially the holders of ecclesiastical offices, such as bishops and rectors and vicars of parishes. The conception has, however, not been thoroughly worked out; it seems to have produced little or no result, and it is doubtful if it is capable of serving any useful purpose. For want of any better theory of State rights it has been applied to the Crown, and some public officers, like the Postmaster-General and the Public Trustee, have been declared to be corporations sole by statute.

Corporations are still subject to the rule of mortmain—a rule introduced in the thirteenth century to prevent feudal claims which arose at the death or during the infancy of a tenant from being prejudiced by the accumulation of land in the hands of bodies which never die and are never under age. A conveyance of land "into mortmain" is not void, but

involves a forfeiture to the lord, who, in the great majority of cases, will be the Crown. But a "licence in mortmain" from the Crown exempts a corporation from the rule, and in the case of statutory bodies a power to hold land is expressly conferred by, or may be obtained under, the incorporating statute.

11. Societies and Institutions.—If we except two statutes which may be treated for all practical purposes as obsolete, there are no prohibitions against the formation of associations or societies for any lawful object —religious, social, political, philanthropic, or the like. The law does not, however, regard such societies (unless formally incorporated) as having any corporate personality; it sees only individuals, owning property, it may be, in common, with rights and duties towards each other flowing from the contract, or rather series of contracts, to be found in the society's rules; for on every change in the membership a new contract must be implied. Such contract or contracts may be varied if, and only if, the rules so provide, by a majority of the members or by a specified majority. The common property, if it is more than mere cash in hand or at the bank, will be vested in trustees, who must deal with it in accordance with the rules or with any trust expressly declared, and it can be made liable for obliga-

tions incurred by, or on behalf of, the society, inasmuch as those who act on its behalf are entitled to be indemnified out of such property. The rule of mortmain has no application to such unincorporated societies. On the other hand, if the objects of the society are charitable in the wide sense, which includes not only the relief of poor persons, but the promotion of religion, learning, and education, gifts of land made during life are void if special formalities are not complied with, and land given by will must, except under special circumstances, be sold within a year from the testator's death. If the objects of the society are not charitable, the rule against perpetuities will make void any gift of property by way of permanent endowment, whether made by will or otherwise; but there seems to be nothing to prevent gifts or bequests from being made to a non-charitable society in such terms that it can, at any time, dispose of the capital at its pleasure. The rules of a society and the trusts which bind its property will, in many cases, fetter its freedom of action and the application of its property in a way very similar to the restrictions which the doctrine of *ultra vires* imposes on a corporation; and in the case of some unincorporated societies, such as registered Trade Unions and Friendly Societies, which have

received a peculiar status by statute, the rule of *ultra vires* has been held directly applicable. Among unincorporated societies, Trade Unions have enjoyed, since 1906, the extraordinary privilege of exemption from liability for tort, at any rate in respect of acts done in contemplation or furtherance of a trade dispute.

Some systems of law recognise as legal persons, not only corporations, but institutions, such as hospitals or places of education; but this conception is unknown to our law. We either treat as a corporation a group of persons—usually the governing body of the institution, though it may include individuals who are beneficiaries and have no share in the government (for instance, the scholars of a college)—or else the property of the institution must be vested in a number of individual trustees, who are bound to apply and deal with it for the purposes of the institution.

12. Agency and Partnership.—Agency may be regarded as an extension of legal personality. Not only in law, but in ordinary life, we look upon an act done by one man in pursuance of another's orders as done by the person who gives the order. Moreover, there seems to be nothing artificial in principle in holding the acts of an employee done in the course of his employment as equivalent to

the acts of the employer. These principles are, however, applied in different degrees in the respective spheres of Criminal and Civil Law.

As regards the more serious crimes, a man is not punishable for a crime committed by another unless he has actually instigated the commission of a crime, though he may be punishable for a crime differing in some degree from that which he has instigated.[1] Yet in the case of some minor offences (*e.g.* sale of beer to a drunken person) a man may be punished even for the unauthorised act or default of those in his employment.

In the case of wrongful acts, which involve civil liability apart from breach of contract or trust, a distinction is drawn between a servant and an independent contractor. A servant is one over whom the employer reserves the control and direction of the mode in which the work is to be done. The master is liable for wrongful acts and defaults of his servant —though they may be unauthorised or even forbidden by him—so long as they are done within the scope of the employment. An

[1] It should be noted that in Criminal Law the actual doer is called the principal in the first degree ; one who instigates is a principal in the second degree or an accessory before the fact. In Civil Law the employer is the principal, the person employed an agent or servant.

omnibus company was held liable for the act of one of its drivers, who overturned a rival omnibus while racing with it and obstructing it, although directions had been issued to the driver forbidding such conduct. The independent contractor is one who has agreed to do a piece of work, but is to be left free to choose his own method of doing it. In such cases the employer is not liable in general for any wrong, which consists in the improper carrying out of such work, though he will, of course, be liable if unlawful acts are done which he has actually authorised.

Contracts made by any agent in pursuance of the principal's instructions are binding on, and operate for, the benefit of the latter. Further, the employment of an agent may be such as to give him an authority to contract on behalf of his principal generally with regard to a wider or narrower class of affairs; and as between the principal and third parties such authority cannot be limited by restrictions imposed by the principal, but not known to third parties.

The fact that a person is acting under the instructions or on behalf of another is no defence to civil or criminal proceedings brought against the agent for tort or crime. On the other hand, an agent acquires no rights under contracts made by him on behalf of

his principal; and where the existence of the principal is known to those contracting with the agent, the latter, as a rule, incurs no liability for such contracts. Where the principal's existence is undisclosed, the other contracting party, on discovering it, has an option whether he will hold agent or principal liable.

When a person purports to act on behalf of another, but without his authority, the latter may subsequently ratify the act of the former, and thereby draw to himself both the benefit of, and the liability for, the act. But if there is no such ratification, the agent will be liable to those who contract on the faith of the authority which he professes to have.

No special form is necessary for the appointment of an agent, except that an agent who is to execute documents under seal in the name of his principal must be appointed by a "power of attorney," which is itself a document under seal. Revocation by the principal, his death, and in some cases his insanity, put an end to the agent's authority, though in general a revocation will be inoperative as against those to whom the principal has held out the agent as having authority, and who have no notice of the revocation. Moreover, modern legislation has made possible (within limits) the creation of

an irrevocable power of attorney, such that even knowledge of the principal's death or insanity will not affect the validity of acts done under it.

An agent must not, without his principal's knowledge and consent, receive any reward or commission from those with whom he deals on his principal's behalf, or derive any profit from transactions entered into on the principal's behalf beyond the remuneration agreed upon. Both civil and criminal liability are incurred by the corrupt giving or receiving of such commission.

In partnership, which is "the relation which subsists between persons carrying on a business in common with a view of profit," every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership. A firm is not a legal personality distinct from its members. In an ordinary partnership each of the partners is liable without limit for all the debts and obligations of the firm. The severity of this rule has been the more acutely felt because the existence of a partnership, which needs no special form for its creation, has been often inferred—less often, it is true, in recent years than formerly—from the fact of the receipt by a person of a share of the profits of a business. Since 1907 the law has per-

mitted the formation of "limited partnerships," which must be registered and must consist of at least one general partner, who is liable without limit, and of one or more limited partners, each of whom is not liable beyond the amount contributed by him on entering into the partnership. A limited partner is forbidden, on pain of rendering his liability unlimited, to take any part in the management of the business, and has no power to bind the firm.

No partnership, whether limited or unlimited, may consist, in the case of a banking business, of more than ten or, in other cases, of more than twenty persons.

CHAPTER V

PROPERTY

1. The Conception of Property.—There is, perhaps, nothing more difficult than to give a precise and consistent meaning to the word "property."[1] When we speak of a man of property, we think, perhaps, in the first instance, of tangible material things which belong to him—land and houses, horses and cattle, furniture and jewellery and pictures—things which he may use or destroy (so far as that is physically possible); from which he may exclude others; which he may sell or give away or bequeath; which, if he has made no disposition of them, will pass on his death to persons related to him. Here, at the outset, we may find it difficult to say whether by "property" we mean the things themselves or the aggregate of rights which

[1] The word "estate" is often used to denote the whole of a man's proprietary rights, more especially after his death. This sense of the word "estate" must not be confused with the special meaning which it has in regard to interests in land (see p. 125).

are exercised over them. To confine the word to either sense would hardly be possible without pedantry, though, on the one hand, we may agree that a thing which has no owner—a rare event in a civilised country, except in the case of some things, like wild animals at large—is not property, and, on the other, we may often avoid confusion by using the word "ownership" for the most extensive right which a man can have over material things. But, further, we shall find that our conception of property relates to many things which are not tangible or material. Our man of property may be an author or a patentee, and we shall hardly be able to say that his copyright or patent-right is not part of his property, or even to avoid speaking of his ownership of the copy-right or patent. He will have debtors: his bank is a debtor to him for the amount standing to his credit; his investments of money are claims to receive payment from the State or from corporations or individuals. Such debts and claims are not rights over any specific tangible objects; they are mere rights against the State or the corporation or the person liable to pay. Yet these rights are transferable, and will pass on his death to his representatives. We cannot exclude them from our notion of property or deny

that in a sense, at any rate, he is the owner of them. On the other hand, his "property" clearly does not include all his rights. To say nothing of his general right of liberty or reputation, his rights as a husband or a parent are not proprietary rights, nor is his right to recover damages for personal injury or defamation; but we may include among proprietary rights the right to recover damages though unliquidated (*i.e.* of uncertain amount until settled by a judge or jury) for breach of contract, or, probably, even for injury to his property. Generally speaking, we shall include under the notion of a man's property in its widest sense all rights which are capable of being transferred to others, of being made available for payment of his debts, or of passing to his representatives on his death.

2. Ownership and Possession.—Turning to rights over tangible things, we must notice the distinction between ownership and possession. The owner of a thing is the person who has, in the fullest degree, those rights of use and enjoyment, of destruction, and of disposition, which have been mentioned above—subject, of course, to the general rules of law which protect the rights of others, and subject to certain limited rights which he or his predecessors may have created in

favour of others. The owner of a pistol is none the less owner because the law prohibits him from discharging it in a public highway; the owner of a field does not cease to be owner because the public or a neighbour has the right to use a footpath across it.

The essence of ownership, then, is that it is a right or an aggregate of rights. Possession, on the other hand, is primarily a matter of fact. If the owner of a watch is robbed of it by a thief, the owner's rights as rights remain intact; the thief acquires no right to the watch as against the owner. But the owner's possession, and with it his actual power to exercise his rights, is for the time being gone; he must recover the watch—as he may even lawfully do by his own act—before he can be said to be again in possession of it. So, too, the owner of land may be out of possession, and another without right may be in possession. In this case the forcible retaking of possession is prohibited under penalties by statute; but the retaking, though punishable, is none the less effective to restore the possession.

The cases of the thief and squatter have been taken as the clearest instances of possession acquired without any right whatever. But possession may be lawfully acquired, and yet be unaccompanied by ownership. An owner who delivers a horse or a bicycle by

way of loan or hire to another parts with the possession to him, but does not cease to be owner. The same is true of one who delivers articles to another in order that the latter may bestow his labour upon them. Such voluntary transfers of possession are called bailments, and the person who so acquires possession is a bailee of the goods. In none of these cases do we think of the owner as having parted with the right of ownership, though it may be that the contract between the parties creates rights in favour of the bailee which the owner cannot use his right of ownership to override.

If we try to analyse the conception of possession, we find two elements. In the first place, it involves some actual power of control over the thing possessed. In the second place, it involves some intention to maintain that control on the part of the possessor. The nature and extent of the control and intention necessary to constitute possession will vary with the circumstances, and particularly with the character of the thing of which the possession is in question. Possession of a house, for instance, will be evidenced by acts different from those which would suffice for possession of a strip of waste land. The occupier of a private house would probably be considered to be in possession of anything placed or left in it—at any rate unless it was

concealed—while the occupier of a shop has been held not to be in possession of a thing dropped in a part of the shop to which the public had access. By a somewhat artificial rule, a servant who receives a thing from his master for the master's use is deemed not to be in possession of it, though the contrary is true where he receives it from a stranger for the master's use.

So far we have thought of ownership and possession as sharply distinguished—the one a matter of right, the other of fact. Nevertheless, possession is a fact which has an enormous legal significance, a fact to which legal rights are attached. In the first place, actual possession is evidence of ownership, and, except in cases where ownership is based on a system of public registration, it is hard to see how any ownership can be proved, otherwise than by going back to some prior possession. If A claims the ownership of land by reason of B's bequest or sale to him, this only raises the question, On what is B's ownership based? and ultimately we shall have to rest content with saying that the root of A's title is the possession of some predecessor, X. Such evidence, however, is not conclusive. The presumption of ownership which follows from A's or X's possession may, for instance, be rebutted by a rival claimant, Y, who can show

that he or his predecessor was in possession, and that A or X wrongfully dispossessed him.

In the second place, possession is not merely evidence of ownership, but (subject to the rights of the owner) is itself and for its own sake entitled to legal protection. If A has been disturbed in his possession by a trespass committed by B, or even if B has deprived A of possession, A's claim to legal protection or redress against B cannot be met by B's plea that C and not A is the true owner. The finder of goods is entitled — except only against one who can show himself to be the owner—to legal protection against all the world. Nor is this right of the possessor based on any responsibility on his part to the owner. The Postmaster-General was held entitled to recover damages for the loss of the mails destroyed by the fault of a colliding ship, though he was not the owner and disclaimed all responsibility to the owners for the loss. This right to redress which the law confers on the possessor is independent of, and at least as old as, if not older than, the legal protection given to the owner. The possessor's right is even spoken of as a "special property," in contradistinction to the "general property" of the owner. It is a right which he may transfer, and which on his death will

pass under his will or according to the rules of intestacy.

Lastly, we may notice that even a wrongful possession, if continued for a certain length of time, matures into what, for practical purposes, is indistinguishable from ownership. A wrongful possession of land for twelve years, of goods for six years, destroys the owner's right to recover his property by action and, at least in the case of land, his right to retake possession.

3. Tenure of Land.—Between ownership of land and of goods every system of law must needs draw distinctions, which are founded on the nature of the subject-matter; but English law has gone further than any other system in this direction, and the line of cleavage is due largely to considerations other than those of natural necessity. It is a commonplace of English law that full ownership of land is possible for no person save the King. In strict legal theory, the place of ownership of land is taken by the two notions of tenure and estate. Those who are commonly called landowners are regarded as "holding" their land mediately or immediately of the King. At the Norman Conquest every acre of land in the country was held to have been forfeited to the King. Large portions he granted to his followers, others he allowed to remain in the possession

of those to whom it had belonged, but by way of re-grant. Every such tenant held upon terms of doing service for his land. A tenant of the King might in turn grant to others to hold of him upon terms of service. The services, whether due from an immediate tenant (tenant in chief) to the King, or from an inferior tenant to his lord, might be military (the finding of a certain number of knights), or religious (the saying of masses for the soul of the donor and his heirs), or labour services (mainly agricultural). Payments in money or in kind were also incidents of tenure from the beginning, and in the course of the Middle Ages all services tended to be commuted into money payments. The personal relation between lord and tenant was emphasised by the requirements of homage and fealty, and in the case of the military tenures the lord had rights valuable to himself and burdensome to the tenant, such as the right of wardship, which entitled him to the custody (without liability to account) of an infant heir's lands, and the right of marriage which enabled him to make a profit out of the marriage of his wards.

A tenure by services military or religious was in any case held to be a free tenure or a freehold. On the other hand, where land was held by labour services, a sharp line came to be drawn between "free" services, which

were certain in amount and comparatively light, and those which were uncertain and more burdensome. This distinction was closely related to the distinction between persons of free condition, and the villeins who were personally unfree, and could not quit the service of their lord. Unfree tenure and status usually coincided, though it was possible for a freeman to hold by the unfree services which were appropriate to a villein without necessarily losing his free status. The tenant in villeinage, whether personally a villein or not, was (as regards his land) without protection in the King's Courts: he was said to hold at the will of the lord; his rights could be asserted in this lord's court only, and were governed by the custom of the manor, a unit of land and jurisdiction comprising lands in the lord's own occupation, and lands held by freeholders and tenants in villeinage. Those who held by free tenure neither military nor religious were said to hold in free socage, and were from the first entitled to the protection of the King's Courts.

The conversion of the military tenures into free socage in the seventeenth century was one of the results of the Civil War; the religious services disappeared at the time of the Reformation; and the fall in the value of money made merely nominal the payments

for which the services of socage tenants had been commuted. Moreover, the creation of new relations of freehold tenure was made practically impossible by the Statute of Quia Emptores in 1290. Since that time a tenant may transfer land to another to hold of the transferor's lord, but cannot grant a freehold in fee-simple to be held to himself. The only substantial incident of freehold tenure which now remains is the lord's right of escheat, *i.e.* his right to resume the land upon the death of a tenant who has died without heirs and without making any disposition of his land. The evidence of any freehold tenure, except between the King and a subject, has thus become obscured, and it is only in rare instances that any private person can successfully assert the right to an escheat. It follows that as regards freeholds the notion of tenure has ceased to have much practical importance, and freehold tenure has become, if we put aside the question of estate, something very like ownership.

Personal villeinage had disappeared by the beginning of the seventeenth century, and before that time the protection of the King's Courts had been extended to the holders of land in villeinage. Though such tenants were still said to hold "at the will of the lord, according to the custom of the manor,"

as their successors are said to do, the first part of this phrase ceased to have any practical meaning when once the King's Courts were prepared to ascertain and enforce the manorial custom. Lands so held were transferred not directly by the act of the parties, but by a surrender to the lord, who then admitted the intended transferee, and all such surrenders and admittances were recorded on the rolls of the Manor Court. A copy of an extract from these rolls formed the evidence of the tenant's title, and this gave rise to the name of copyholder, by which the modern successor of the villein tenant is known. This method of transfer is still the most notable characteristic of the copyholder; but his holding is also subject to payments, certain or at any rate assessable, by way of rent, and upon death and alienation, and in some manors the lord's right to take the best beast or chattel of a deceased tenant as a 'heriot' still exists. As a rule the copyholder is not entitled either to the timber upon, or to the minerals under, his land. In spite of modern statutes, which have provided for the conversion of copyholds into freeholds upon payment of compensation at the application of either lord or tenant, copyhold tenure is still common.

4. Estates in Land.—Of far greater importanee than tenure at the present day is

the notion of "estate." We may think of an estate as a portion of ownership more or less limited in time. This limitation in time is most clearly seen in the case of a life estate, whether it be an estate held for the life of the tenant, or what is called an estate *pur auter vie*, one held for the life or lives of some other person or persons. The holder of such an estate in land is, like an owner, entitled to the possession, use, and enjoyment of the land, and he can dispose of his interest; but at the death of the person by whose life the extent of his estate is measured, the estate comes to an end, and nothing passes from the holder. Even the holder's enjoyment is restricted (unless he be declared "unimpeachable for waste") by consideration for the rights of those who have subsequent estates in the land. He must not diminish the capital value of the land by the commission of acts called "waste," such as cutting timber or opening mines.

At the other end of the scale we have the estate in "fee-simple." Such an estate is practically equivalent to ownership. It confers full rights of possession and enjoyment (unrestricted by any rules as to waste) and full rights of disposition whether during the tenant's lifetime or by his will. If he dies intestate, the land will pass to his heir, if any can be traced. Only in the event of

his death intestate and without ascertainable heirs, will the estate come to an end, and the land pass by escheat to the lord, who, as we have seen, will in the great majority of cases be the Crown. The limit in time is here practically non-existent.

Intermediate between the life-estate and the estate in fee-simple is the estate tail. Like the fee-simple, it is an estate of inheritance. The tenant in tail has full rights of possession and enjoyment without regard to waste. Nor does the estate come to an end with the tenant's death: it passes to his heirs, but only to a limited class of heirs, "the heirs of his body," that is, his descendants. The line of descent may be further restricted by making the estate an estate in tail-male, *i.e.* one descendible only to males and only in the male line, or conceivably (though in practice this appears never to be done) in tail female, descendible only to and through females. There is even an estate known as an estate in "special tail," inheritable only by the issue of the tenant by a certain wife or husband. In the latter case, if the wife or husband die without issue the tenant is said to be tenant in tail, "after possibility of issue extinct," and his rights are substantially no greater than those of a tenant for life. In any case a tenant in tail has no power to dispose

of his estate by will, and unless he resorts to the special procedure which will be described later, he cannot convey any interest in the land which will last beyond his own death.

Estates in fee-simple, in tail, or for life, may exist not only in land held by freehold tenure, in which case they are called freehold estates, but also in copyhold land, except that for the creation of an estate tail in copyholds the existence of a special custom permitting such estate must be shown.

5. Reversions and Remainders. — An estate for life is less than an estate tail, and both are smaller than a fee-simple. Suppose now that a tenant in fee-simple grants the land to another to hold for life or in tail. If he does nothing more he will still retain his fee-simple, but he will have deprived himself of the right to present possession and enjoyment of the land; his estate has become a future estate, which will again become a present estate, an "estate in possession," only when the smaller estate, the "particular estate" which has been carved out of it, comes to an end. For the time being, what is left to him is called a reversion. Further, he may by the same instrument grant a present estate, say for life, to A, followed by an estate for life or in tail to B, and if he wishes as many further particular estates

(for life or in tail) to other persons successively as he pleases, ending up, if he thinks fit, with an estate in fee-simple to some person named. Each of these future estates is called a remainder. No reversion or remainder, however, can be placed after a fee-simple. Each of these future estates, though it gives no present right to possession or enjoyment, is treated as something already in existence, which can be disposed of and will descend (so far as it is inheritable) just like a present estate. If, for instance, A is tenant for life and B tenant in fee-simple in reversion or remainder, B's death before A will not destroy the estate in fee-simple, but B's heir, or the person to whom B has conveyed it by deed, or left it by will, is entitled to come in on A's death. So again, if A is tenant in tail, and B tenant in fee-simple in reversion, the failure of A's issue at his death, or at any later time, will vest the fee-simple in possession in whatever person then represents B. In such cases, ownership, we may say, is cut up into lengths called estates. None of the holders of an estate, except the tenant in fee-simple when in possession, is fully owner, but each as he comes into possession is a "limited" owner.

Besides reversions and remainders, another class of future estates in land, known as "executory interests" in land, may be

created by deed or will. But it would take us too far into the technicalities of real property law to attempt a description of these.

6. Strict Settlements.—The custom of "entailing" land, as it is called, is well known, though its mechanism is little understood. As a matter of fact, the estate tail by itself would do little to carry out the wishes of a landowner who desires to secure that his land shall continue as long as possible in his family in a certain course of devolution, and indeed it is possible, without employing the estate tail, to create a settlement of land which would produce about the same results as the ordinary "entail." But in the strict settlement, as usually drawn, the estate tail forms an essential element.

The Statute of De Donis, 1290, was designed to secure, and apparently at first succeeded in securing, that a tenant in tail should make no disposition of his land which would defeat the rights of his issue or of those who were to take in remainder or reversion. But by the middle of the fifteenth century the courts had developed a collusive procedure which defeated the obvious intention of the statute. The effects of this procedure, stripped of its machinery of fictions, are preserved by an Act of 1833, which enables any tenant in tail in possession to "bar" the estate-tail and

thereby to confer on himself or another the fee-simple of the land, by means of a deed enrolled in the High Court, and so to destroy the rights of his issue and all who would take on failure of his issue. A tenant in tail who is not in possession can do the same, with the consent of the Protector of the settlement, who is usually the tenant for life in possession ; without such consent he can only defeat the rights of his own issue, and so create what is called a " base-fee," an estate which can be dealt with and which will descend like an ordinary fee-simple, but which will last so long only as he and his own issue survive.

The strict settlement of land, and the means by which such a settlement is put an end to —the method of " breaking the entail "— can now be explained. Imagine that A, entitled in fee-simple to landed property, desires upon his marriage to make the usual settlement. He will convey his estate so as to confer on himself an estate for life, with remainder in tail-male to each of his unborn sons successively, in order of seniority. In default of sons, an estate in tail-general (*i.e.* not limited in descent to males) will be given to his daughters, not, as a rule, successively, but as tenants in common ; there will be an ultimate reversion to himself in fee-simple, and provision will be made for securing a

jointure rent-charge out of the land to his widow, and sums of money ("portions") charged upon the land for younger children. For the time being the settlor is merely tenant for life and has lost all power of controlling the devolution of the property after his death. When, however, his eldest son comes of age, the entail can be "broken." The son by himself could create a base fee, subject to his father's life estate; but since this estate would disappear altogether if he died without issue before his father, such a course would do little to enable the son to raise any money which would free him from dependence on his father. He is thus likely to come to terms with the latter. With his father's consent the eldest son can dispose of the fee-simple, and destroy all estates subsequent to his own (the charges for jointure and portions have priority over the estate tail). The property is resettled so that the son is given an annual sum or other provision out of the land during his father's lifetime. An estate for life expectant on the father's death is given to the son, with successive remainders in tail to his children: similar estates for life and in tail are given to his brothers and sisters and their issue. In this way the land is tied up for another generation, and in each generation the process will probably be repeated, unless

it should happen that a tenant for life should die before there has been a resettlement.[1]

The great majority of the large landed properties of this country are thus perpetually kept in settlement, and few of the persons whom we find in possession of land are more than tenants for life. The evils of this system, which put land in the hands of persons who had no power to dispose of it, and who might, for want of ready money, be unable to use it to the best advantage, have led to the passing of the Settled Land Acts (beginning in 1882), under which tenants for life and other limited owners are given powers of sale and leasing, and otherwise dealing with settled land. There are now, with few exceptions,[2] no lands in this country of which the limited owner cannot dispose almost as completely as if he was full owner, though in the case of a "principal mansion house" the consent of the court or of trustees is necessary. But a

[1] A perpetual settlement by giving an indefinite series of estates for life is made impossible by the rule which prevents an estate in land from being given to the unborn child of an unborn person who himself takes an estate, as well as by the rule against perpetuities (see p. 75).

[2] There are some tenants in tail under settlements made by Acts of Parliament, of land, purchased with money voted by Parliament as a reward for public services, the ultimate reversion being in the Crown. Such tenants in tail cannot "bar" the estate tail, nor avail themselves of the Settled Land Acts.

sale under the Settled Land Acts does not put an end to the settlement. The land is set free, but the purchase-money becomes settled. It is put into the hands of trustees and invested in the purchase of other land, which becomes subject to the settlement; or in trustee securities which will be dealt with and devolve as if they were settled land; or the purchase-money can be made available for the discharge of incumbrances or for effecting improvements on the settled land.

7. LEASEHOLDS. — There is an important class of interests in land to which the name of estate can hardly be denied, which are neither freehold nor copyhold, namely, leaseholds. A leasehold estate is one, the duration of which is measured by a fixed period of time; it is often called a term of years, though a tenancy for weeks or months is equally a leasehold. There is no superior limit; a term of 1000 or 10,000 years (such terms actually occur) is still a leasehold. Nor does a term cease to be a leasehold because it is determinable by an event which may happen, or which is certain to happen, within the term—*e.g.* if A holds land for 99 years or for 999 years, "if he shall so long live," he is still a leaseholder, though it is nearly or quite certain that he will not outlive the term. A freeholder may grant a lease of any duration, though unless

he is a tenant in fee-simple, or the lease is made under the powers given by the Settled Land Acts, the lease will fail when the lessor dies; a copyholder as a rule can grant no more than a term of one year. A leaseholder (unless prohibited by his own lease) can himself grant a lease for any term less than that which he holds; a grant for an equal or greater term would be merely a transfer of his own interest.

Historical reasons have made a great gulf between freehold and copyhold estates on the one hand and leaseholds on the other. The latter were for long regarded not so much as estates or interests in the land, but rather as merely contractual rights. The freeholder in the King's Court and the villein tenant in the Lord's Court was originally protected by a *real* action, an action in which he could recover the thing (*res*), the land itself. The leaseholder (except as against his landlord or persons claiming under him) had no such remedy; he could bring only a *personal* action, in which he could not recover his land, but merely money compensation. In this way his rights resembled those of an owner of money or goods, and indeed there is evidence to show that leaseholds were often acquired as investments for money. Thus it comes that while freeholds and copyholds were classed as *real* property, leaseholds,

like goods, are *personal* property and are classed as chattels, though in virtue of their close relation to real property they are distinguished as "chattels real." Although leaseholders have long since obtained full remedies for the recovery of land, remedies which are indeed far superior to the old real actions, this classification still subsists and its chief effect survives in the law of succession. As we shall see, the destination of a man's lands, on intestacy, will be widely different according as they are freeholds or leaseholds.

Between the grantor of a leasehold and the tenant (lessor and lessee) there is a relation of tenure, and while the lease subsists the lessor has a reversion. The most important incident of the reversion is the lessor's right to the rent reserved by the lease, generally substantial and often equal to the full annual value of the property. This right he can enforce not only by action, but also by a form of self-help known as distress, the seizure of any goods, whether belonging to the tenant or a stranger, which may be found on the premises. Originally this was merely a method of putting pressure upon the tenant, but the distrainer has had, since the end of the seventeenth century, a power to sell the goods and so pay himself, the surplus (if any) going to the owner. Recent legislation has largely re-

stricted the right to distrain goods found upon the premises but not belonging to the tenant.

The rights and duties of the leasehold tenant are, as a rule, explicitly provided for by the terms of the lease, which will contain covenants such as those relating to payment of rent, repair, cultivation, and building, or forbidding the carrying on of certain trades. Such covenants, so far as they relate to the premises leased, are binding on and enforceable by assignees both of lessor and lessee. The lessor is usually further protected by a proviso allowing him to re-enter and put an end to the lease in the event of the tenant's failure to pay rent or observe the other covenants. A proviso for re-entry in the event of the tenant's assigning or underletting the premises without the lessor's consent can still be, and sometimes is, literally enforced in the most oppressive way, but except in this and one or two other cases the courts have power to give relief to the tenant, and in the majority of cases the right to re-enter cannot be exercised until the tenant has been given an opportunity of making good the breach of covenant. At the end of the lease the tenant must yield up the premises, together with all buildings, fixtures, trees, and plants thereon, including even what he has himself added; but to some extent this rule is relaxed in

favour of trade and agricultural fixtures, and a right to remove tenants' fixtures may be given by the terms of the lease. Under the Agricultural Holdings Act, 1908, the tenant of agricultural land is entitled to claim compensation from his landlord for numerous classes of improvements made by him.

A special form of leasehold is the tenancy from year to year which continues until notice to put an end to it is given by either party. In ordinary cases the notice must be a six months' notice, ending with a completed year, but in the case of agricultural tenancies the Agricultural Holdings Act, 1908, requires a full year's notice.

Closely akin to leaseholds, and like them classed as personal interests in land, are tenancies at will and at sufferance. The former is a tenancy made by the agreement of the parties on the terms that either may put an end to it at any moment at the shortest notiee ; the latter arises where a tenant whose interest has expired continues in possession without the landlord either assenting or dissenting.

8. Co-ownership.—Co-ownership, which entitles two or morc persons concurrently to the possession and enjoyment of the same property, can exist in relation both to land and goods. When it takes the form of ownership or tenancy in common, the share of each is treated as a separate item of

property which he can not only transfer in his lifetime, but which will pass on his death to his representatives. In the case of joint tenancy or ownership, on the other hand, the rights of each (except the last survivor) are extinguished by his death so as to increase the interest of the survivor or survivors. A joint owner or tenant may, however, transfer his interest in his lifetime (though not by will); and such a transfer will have the effect of making the transferee an owner or tenant in common with the other or others, though the others will continue as between themselves to be joint tenants. Any one of a number of co-owners is entitled to have the property "partitioned," *i.e.* divided, or at any rate to have the property sold and his share paid out to him. Where a number of trustees are appointed they are always made joint tenants, in order that in case of death of one the whole property may be vested in the survivors; but in other cases joint tenancy is inconvenient and rarely occurs.

9. Other Interests in Land.—Besides the interests in land which are known as estates, and which when they are present estates give a right to possession of the land, English law like other systems recognises rights of a more restricted kind. Among these we may notice *easements* such as rights

of way, rights of light, rights to take water or to discharge water over the land of another. A true easement must always be "appurtenant" to a piece of land. An individual cannot, for instance, as such have a right of way over my land, but only as owner of some adjacent piece of land Rights similar to easements may, however, exist in favour of the public (*e.g.* a public highway) or in favour of a limited class—*e.g.* the fishermen of a village may by custom have the right to dry their nets on a piece of land; the inhabitants of a village may have a right to use the village green for purposes of recreation. *Profits à prendre* are rights to take things of value (other than water) from land, such as the right of common of pasture, or rights of fishery (Commoners, it should be noticed, are not owners of the common). Such rights, though commonly appendant or appurtenant to land,—there is little practical difference between the two phrases,—are not necessarily so. They may exist in favour of individuals, and in some cases in favour of a limited class, but, with the exception of the public right of fishing in tidal water, they cannot exist in favour of the public at large.

A rent-charge is the right to receive an annual sum out of the income of land, usually in perpetuity, and to distrain if the payments

are in arrear; the owner of the land is also personally liable to pay, and further remedies against the land have been given by statute. In some parts of the country it is the practice to sell freehold land for building and to take the price in the form of a perpetual rent-charge created by the purchaser; this practice takes the place of the more common building lease. The right to take tithes, *i.e.* a share of the produce of the land in kind, originally vested only in ecclesiastical persons and bodies, was at the Reformation transferred in many cases to laymen, though tithes continued to form the most important kind of ecclesiastical endowment. Under the legislation of the nineteenth century tithes have been commuted into tithe rent-charge, an annual sum varying with the price of corn. Unlike other rent-charges, tithe rent-charge can now be recovered only by the appointment of a receiver of the income of land, or where the owner is himself in occupation by distress. The rights of presentation to livings in the Church of England, known as advowsons, which are often in the hands of laymen, are also regarded as interests in land. Recent legislation has done much to restrict dealings in advowsons.

10. Conveyances of Land.—The creation and transfer of estates and interests in land have had a long and complicated history, but

are now governed by a comparatively simple rule. Generally speaking, one may say that apart from dispositions by will, a deed, *i.e.* a sealed writing, is necessary, though leases for not more than three years at a rent equal to at least two-thirds of the full value may still be made without a deed or even by word of mouth. But an agreement made in writing and for value, to confer an interest in land, is specifically enforceable in Equity, and an attempted disposition for value by unsealed writing will be treated as equivalent to such an agreement. Moreover, even at Common Law a lease which ought to be made by deed but is not, will not completely fail of effect, if possession is taken and rent paid under it; the tenant will be treated as tenant from year to year upon the terms of the lease so far as they are applicable to such a tenancy.

The effect of long-continued possession of land in extinguishing adverse rights, and so converting the possession into what is indistinguishable from ownership, has already been referred to. Different in theory, but similar in effect, are the provisions of the Prescription Act, 1832, under which rights to easements and *profits à prendre* may be established by reason of enjoyment for a period of not less than twenty years in the one case, and not less than thirty years in the other.

The trouble and expense involved in all dealings with land is still very great in the absence of any general provision for preserving any public record of title. Upon a sale of land the purchaser is normally entitled to have produced to him and to investigate the deeds recording previous transactions in the land going back for forty years; and though this period is commonly reduced by agreement, the shortening of the period throws a risk on the purchaser, who is not only bound by all legal interests in the land which actually exist whether he discovers them or not, but also by all equitable interests which he would have discovered if he had insisted on an investigation for the longer period. Obviously no purchaser can, without expert assistance, make the investigation, of which the result will depend on the effect of numerous technical documents, such as settlements and mortgages. Supposing that the result of the investigation is satisfactory, and the purchase is completed, a subsequent purchaser must again go through the whole process; the results of each investigation are practically thrown away for the future. To do away with the evils of this system, as well as to guard against dangers of fraud and forgery, a Land Registry has been established, and since 1897 registration has been made compulsory upon the first

sale of every piece of land in the County of London. The ideal of land registration is that a government office, after investigating the title, enters the applicant upon the register as owner, and furnishes him with a certificate in accordance with the entry; the entry is conclusive as to his right, and no further investigation of the previous title can subsequently be necessary. At every subsequent dealing with the land a new entry and a new certificate supersedes the old one. One may compare such a public certification of the title with the stamp on a coin, which attests the genuineness of the metal, whereas the system of private investigation of title is as if a man was obliged to employ an expert analyst to test the genuineness of the coins which might be tendered to him. Such a system of registration has been found to work well in other countries, and there can be no doubt that it can, and ought to be, made universal with us. It cannot, however, be said that the ideal aimed at has as yet been attained. Under the Land Transfer Acts the Registry has not so far in the great majority of cases been able to register owners with more than a "possessory" title, which does not do away with the necessity of investigating the title prior to registration, though provision is made for ultimately converting

such possessory title into an absolute one. The provisions for giving compensation to persons who suffer loss in consequence of fraud have proved to be unsatisfactory, and a loophole has been found by which unregistered dealings in registered land are still possible. Moreover, it would seem that solicitors have some ground of complaint that insufficient remuneration is allowed for the work of putting land on the register, which is in some ways more troublesome than ordinary conveyancing. Finally, it may be doubted whether a completely satisfactory system of registration is possible so long as we continue to recognise limited interests in land as legal estates.

11. Personal Property.—The terms "personal property" and "chattels" includes not only leaseholds, which are "chattels real," but also "goods" in the sense of tangible, moveable property, and intangible things known as "choses in action," such as patents and copyrights and claims to money or goods. As opposed to leaseholds, all such property is classed as "chattels personal" or "pure personalty." We may notice in the first instance that at law (as opposed to equity) no limited interests in personal property can be created. The notion of estates has no application. At law a man can only be owner of a horse or a picture or a sum of stock; he cannot be tenant

for life or for years. Settlements of personal property may, however, be made under which trustees will hold the property upon trust for various persons for limited interests. In the case of a marriage settlement of personalty, it is usual, after providing life-interests for husband and wife, to direct equal division of the capital among the children, and even land may be put into the hands of trustees upon trust to sell and to deal with the proceeds in the same way. On the other hand, leaseholds, jewellery, furniture, and pictures are sometimes settled (as "heirlooms") so as to devolve as nearly as possible with real estate strictly settled in the way previously described; but this result cannot be completely attained, since even in equity no interest in personal property analogous to an estate tail is recognised; the person who would have been tenant in tail, if the nature of the property had allowed, will become absolute owner.

12. Goods.—The transfer of goods is most commonly made by merely handing them over, and such a transfer is equally effectual whether the transfer is for value or by way of gift. An unconditional contract of sale of goods which are specific and ready for delivery is sufficient to transfer the ownership without any delivery. When goods are on board ship, the indorsement and delivery of the bill of

lading (which is an acknowledgment of receipt of the goods given by the master of the ship) transfers the ownership. Further, goods may be transferred without delivery by deed, and where the transaction is for value even by writing without seal. Such deeds or instruments as a rule require for their validity to be registered under the Bills of Sale Acts, which have been passed to prevent persons from obtaining credit by continuing to remain in possession of goods when they have secretly transferred their interest in them to others. A bill of sale is commonly used as a means of mortgaging goods, but it may equally be used as an out-and-out conveyance. The property in British ships can only be transferred by means of a bill of sale which is registered in the shipping register.

There are a few exceptions to the general rule that no one can make a transfer of goods who is not the owner. A person who receives current coins for value and in good faith, a purchaser of goods in open market ("market overt") in good faith, acquires a good right even from a thief. So too the Factors Act, 1889, protects persons who receive goods in good faith and for value from a mercantile agent to whom goods have been entrusted by the owner for the purpose of being sold or pledged.

13. Intangible Personal Property.—A

patent is the exclusive right granted by the Crown of "using, exercising, and vending" an invention. Such grants are based on the Statute of Monopolies, 1621, which while in general prohibiting the grant of monopolies, made an exception in favour of patents "for the term of fourteen years or under for the sole working or making of any manner of new manufactures within the realm to the true and first inventor or inventors of such manufactures, which others at the time of making such letters patent and grants shall not use." The validity of a patent still turns mainly upon the question whether it complies with the enactment. The grant is now always made for the term of fourteen years, but where it appears that a patentee has been insufficiently remunerated, the Court may extend the term for a further period of seven or, in exceptional cases, fourteen years. As a condition of obtaining the patent, the applicant must furnish a specification (which in all ordinary cases is open to public inspection), showing the nature of his invention and the method of carrying it into effect. A register of patents is kept at the Patent Office, and assignments and licences to use patents must be entered upon it. In some cases a patentee can be compelled to grant a licence to use his patent on reasonable terms.

Copyright in the case of literary works is

the sole and exclusive right of the author to print or otherwise multiply copies. The right, which is a statutory one, continues for forty-two years from publication or for the author's lifetime and seven years after his death, whichever is the longer period, and is assignable by writing. The author of unpublished matter has also a common law right to restrain publication. The existence of literary copyright does not depend upon registration, but an entry at Stationers' Hall is necessary before an action for infringement can be brought. Dramatic and Musical Copyright, which include the exclusive right of public representation, are for the same term as literary copyright; but the term of artistic copyright is different for different classes of works of art, and in some cases registration must have preceded infringement. The whole law is at present being recast by a Bill of which the principal proposals are the introduction of a uniform term extending to fifty years beyond the author's death, and a novel provision which will cause the copyright in spite of any assignment by the author to revert to his representatives at the end of twenty-five years after his death.

The right to registered Trade Marks grew out of the rules of Common Law and Equity, under which a trader who passed off his

goods upon the public as those of another was held liable to damages and an injunction at the suit of the latter. These rules[1] still exist, but they have been supplemented by statutory provisions which enable a trader to acquire by registration at the Patent Office the exclusive right to use a distinctive trade mark in connection with his goods. Words (other than invented words, *e.g.* "tabloid") which directly refer to the character or quality of the goods, and names of places, cannot be so appropriated. The right to a trade mark can only be assigned in connection with the goodwill of the business concerned in the goods for which it has been registered, and comes to an end with that goodwill.

The transfer of interests in the national debt and public funds and in the debts of municipal and other public authorities, and of debentures, stocks, and shares, in companies, is governed by numerous statutes. Such interests cannot be transferred without writing, and in most cases a deed is required; in any case the transfer is not complete except by entry in the books of the Bank of England or the body or company concerned.

Something has already been said as to the assignment of ordinary debts and "choses in action";[2] and the law relating to negoti-

[1] See p. 223. [2] See p. 51.

able instruments—bills of exchange, cheques, and promissory-notes—will be dealt with in the next chapter.

14. Trusts.—The reader who has followed what was said in the second chapter will already have apprcciated the nature of the trust, one of the most characteristic institutions of English Law, and its enormous importance as a part of our law of property.

Except that trusts of land must be created by writing, a trust may be created by any sufficient expression of intention to create it, whether the legal ownership [1] is transferred to another to hold as trustee or remains with the creator of the trust, who in that case will himself be the trustee. If, however, an attempt is made to create a trust by transfer to a trustee, but the transfer itself fails from a defect in form—where land, for instanee, is transferred by unsealed writing, or the transfer of shares in a company is not registered in the company's books—the trust also will fail, unless the transaction is one made for value, a term which includes settlements or agreements for settlement in consideration of a contemplated marriage, but not of one

[1] Note that equitable rights may themselves form the subject of a trust. A, who has an interest in property held by B upon trust for him, may hold that interest upon trust for D, or transfer it to C upon trust for D.

already celebrated. So too an attempt to make a direct gift which fails because the proper method of transfer is not employed, will not take effect as a trust. On the other hand, a trust will not fail because the intended trustee refuses to undertake it, or, in the case of a trust created by will, dies before the testator.

Trusts arise not only by a direct expression of intention but by an inference or implication which may or may not correspond to any actual intention. Thus an agreement for the sale of land makes the vendor a trustee, subject to the payment of the purchase money, for the purchaser. Upon a bequest to a trustee upon trust for a beneficiary who predeceases the testator, the trustee will hold the property for the benefit of the testator's representatives. A gratuitous transfer of property (other than land) to another will be presumed to be made upon trust for the person transferring, unless there is something to show that a benefit to the transferee was intended; such intention will be presumed where the transfer is made by a father to his child. Again, a person who acquires property for his own benefit by taking advantage of his position as trustee, will be treated as holding it for the benefit of those entitled under the trust.

When all the possible beneficiaries are of full age and under no disability (such as that

of a married woman who is restrained from anticipation), they may put an end to the trust by requiring the trustee to transfer the property to them or to dispose of it according to their directions, and this is so in spite of any direction to the contrary in the settlement, such as a direction that payment is not to be made to a beneficiary till he reaches the age of twenty-five.

The duties of a trustee may be indefinitely varied by the terms of the instrument which creates the trust, and may range from a mere duty to make a legal conveyance to the beneficiary at his request, and in the meantime to permit him to possess and enjoy the property, to extensive and onerous duties of management, sale, investment, and application of capital and income. The trustee is entitled to no remuneration for his trouble, unless the terms of the trust so direct, and is liable not only for dishonest dealing with the trust property, but for all loss due either to non-observance of the directions in the settlement and the general rules of law, or to failure on his part to act up to the high standard of care which the law requires of him. The range of permissible investments, for instance, is defined by statute in so far as the settlement makes no provision; but even within the limits of investment allowed by

statute or settlement a trustee may incur liability by want of due care in exercising his discretion. Nor may the trustee entrust the exercise of his discretion in this or other matters to others, or leave the trust property in the hands of others or even of a co-trustee, though he is entitled to obtain and pay for the advice and assistance of professional persons, such as solicitors and bankers. Any failure of duty in a trustee, however innocent morally, is a breach of trust.

In cases of doubt, a trustee may protect himself by obtaining, at the cost of the trust property, the direction of the court, and the Judicial Trustees Act, 1896, has enabled the court to relieve a trustee who has acted honestly and reasonably from liability for breach of trust and for omitting to obtain such direction.

Upon the death or retirement of a trustee, the surviving trustees have, in the absence of any provision in the settlement, the power of appointing another in his place. Most family settlements confer such a power on the person who, for the time being, is entitled to the income of the property. The court also has a power to appoint new trustees and to remove a trustee for unfitness or misconduct.

The rights of the beneficiaries under a trust, as has already been seen, are interests

in property closely analogous to legal interests, and but little inferior to them in security. Not only do they hold good against the trustee himself, and against his creditors during his lifetime and his representatives after his death, but also against all to whom he may have transferred the property, and who cannot show that they acquired it for value and without notice of the trust. Even where a trustee has misappropriated trust property the fund may still preserve its identity, and so long as it can be identified the rights of the beneficiaries will attach to the fund into whatever form it may have been converted by him. If he has used it to swell his bank balance, it will be presumed that, in drawing on that balance, he has drawn out his own money before touching trust money; if he has made an investment with trust money—even an investment which is itself a breach of trust—that investment is still trust property, to which the trustee's creditors have no claim.

Still, in the case, at any rate, of a sole trustee, the risk of loss through his dishonest dealing is not inconsiderable. Moreover, the severity which the courts visit even the honest mistakes of trustees has made it difficult to get the gratuitous services of suitable persons, while the provision sometimes inserted in a settlement for giving remuneration to a

professional man who is one of the trustees is open to considerable objection, since it may give him an interest in incurring expense, and will, in any case, tend to make the other trustees leave the management mainly in his hands. The Judicial Trustees Act, 1896, enabled the court to appoint a judicial trustee, who should be bound to render periodical accounts to the court, and to whom remuneration might be assigned; but this provision seems to have been little acted upon. A new departure was made in 1906 by the institution of the Public Trustee. This officer may be appointed trustee under any will or settlement, either as a mere "custodian" trustee, in whom the ownership of the trust property is vested, leaving the active duties to other trustees, or as an ordinary trustee, with powers and duties of management. There are provisions making the employment of the Public Trustee specially available and useful for small properties. Fees in proportion to the value are payable in respect of all property in the hands of the Public Trustee; but his remuneration, like that of other Government servants, is a fixed salary. The consolidated fund of the United Kingdom is liable to the beneficiaries for the acts and defaults of the Public Trustee and his subordinates.

15. Mortgage and Pledge.—The ordinary

form of mortgage of freehold land has already been described, in which the legal ownership of land is conveyed to the creditor with a proviso that he shall reconvey upon payment at a specified time; and we have seen that Equity long ago laid down the rule that, in spite of the plain words of such a proviso, the mortgagor continued to have for an indefinite time an "equity of redemption," by virtue of which he was still in a sense—"in equity"—owner of the property.

Other forms of property, real or personal, may be mortgaged with similar effect by a transfer in the appropriate form with a proviso for redemption. There are also less formal kinds of mortgage, in which the mortgagor gives the mortgagee a merely equitable interest in property together with a right to call for a legal mortgage, and among these the mortgage by deposit of documents, such as title-deeds or share certificates, may be mentioned. In the case of such deposits the rule that writing is required for the creation of interests in land is dispensed with.

Whether a mortgage is legal or equitable, the mortgagee can enforce his security by applying to the court for an order for foreclosure. Upon proof of the mortgage the court will make an order for foreclosure *nisi*, under which an officer of the court is directed

to find what is due for principal, interest, and costs, and the mortgagor is ordered to pay within six months from the time when the amount is certified. If he fails to do so, the mortgagee will be entitled to an order of foreclosure absolute, the effect of which will be to vest the mortgaged property in him absolutely, but at the same time to prevent him—even if the property should prove insufficient—from claiming payment from the mortgagor, except upon terms of giving him a fresh right to redeem. As an alternative to foreclosure, the court may direct a sale of the property, and this may be fairer to both parties, since any surplus upon such sale will belong to the mortgagor, while the mortgagee may still sue for any deficiency.

In order to redeem, the mortgagor must give six months' notice or pay six months' interest. He may apply to the court if his right to redeem is disputed.

Without any application to the court, the mortgagee, if his mortgage is a conveyance of the legal estate or ownership, may take possession; but this course is undesirable, since he may be called upon in a redemption action to account strictly not only for profits actually received by him, but also for those which he might but for his default have received, and all such profits, so far as they exceed the interest

due for the time being, must be set off against the principal. A mortgage may contain a clause giving the mortgagee a power of sale, and such a power (subject to certain conditions) is now implied in every mortgage made by deed. If the power is exercised, the proceeds are applicable in the same way as the proceeds of a sale ordered by the court, and the mortgagor will remain liable to pay any deficiency. A power for the mortgagee to appoint a receiver who will collect the rents and profits is also now implied in mortgages by deed. To appoint a receiver is more convenient for the mortgagee than taking possession, since he is not responsible for the receiver's acts and defaults; any surplus beyond the outgoings (including the receiver's remuneration) and the interest due, must be paid over to the mortgagor, and will not go in reduction of the principal.

Mortgagor and mortgagee have each, while in possession, considerable powers of leasing land mortgaged by deed.

Successive mortgages of the same property to different persons are easily possible, since an equity of redemption may be again mortgaged, and it may well happen that the total amount advanced exceeds the value of the property. In the case of mortgages of land, the priorities will normally depend on

the application of two rules: (1) A person having the legal estate will take priority over those whose interests are merely equitable, and this rule goes so far as to permit a third or subsequent mortgagee, who acquires the legal estate from a first mortgagee, to claim priority over an intermediate mortgagee, of whose rights he was ignorant when he advanced his money. (2) If neither of two competing claimants has the legal estate, the priorities will be in order of time. But these rules both assume that the "equities" of the competing mortgagees are equal, and it may happen that a prior, and sometimes even a legal, mortgagee has by his negligence—for instance, by allowing the title-deeds of property to be in the hands of the mortgagor—enabled the latter to commit a fraud upon a later mortgagee; in such cases the prior mortgagee has made his equity "worse" than that of the later, and will accordingly be postponed. In the case of mortgages of debts and of the interests of a beneficiary in personal property (other than leaseholds) in the hands of a trustee, priority depends on the order in which notice of the assignment or charge was given to the debtor or trustee; in the case of bills of sale, upon the order in which successive bills of sale were registered.

A pledge is a security upon goods created

by the actual transfer of the possession of the goods themselves or of such documents of title to goods as bills of lading, but without the conveyance of any legal ownership. A pledge carries with it a power of sale, but there is nothing corresponding to foreclosure. The business of pawnbrokers, which consists in lending money upon pledges of goods, is the subject of special statutory regulation.

The term *lien* is used in different senses. A common law or possessory lien is the right to retain goods, money, or documents which are in one's possession until payment of some claim due from the owner. It commonly arises in respect of services rendered in relation to the property, as in the case of the carriage of goods; but in some cases, like those of a solicitor and banker, the lien may be asserted in respect of the general balance due from the customer. An innkeeper has a lien for his charges upon the traveller's goods brought to the inn, and, contrary to the usual rule, has by statute been given a power of sale over such goods. Liens of this kind, being mere rights of retention, are lost as soon as possession is given up.

The equitable lien of the vendor of land, who has conveyed the property without receiving payment of the purchase money, is quite independent of possession, and gives

a right to have the property sold under an order of the Court.

Maritime liens upon ships and cargoes are also in the nature of mortgages or charges independent of possession. They arise in respect of damage done by collision and upon advances of money or the rendering of services, such as salvage, in times of emergency. In as much as the later advance or service is beneficial to the holder of an earlier lien, it will, as a rule, rank in priority to it.

16. Execution and Bankruptcy.—When judgment has been obtained against a man in respect of any debt or liability, it will be enforced, if need be, by execution, *i.e.* the court will make an order, under which a sufficient part of the debtor's property is seized and sold or otherwise made available for payment. At one time execution might be made against the debtor's person, and he could be kept in prison indefinitely in default of payment. Since 1869 imprisonment for debt has been abolished, except in certain cases; in particular, failure to comply with an order for payment made by a County Court may be punished by a period of imprisonment.

When a person's property is insufficient for payment of his debts, it would obviously be unfair that the creditors who first obtain judgment and execution should be paid in

full, leaving nothing to those who may try to enforce their claims later ; nor is it desirable that a man should indefinitely remain under a load of debts which (it may be through no fault of his own) he is unable to meet. This is the justification of the law of bankruptcy, originally applicable only to traders, but now with few exceptions to all insolvent persons.[1]

The debtor or a creditor presents his petition to the Bankruptcy Court of the district in which the debtor resides or carries on business—in London, the High Court; elsewhere, one of the County Courts. An act of bankruptcy must be proved, and under this term are included various acts, which show the debtor's insolvency or his intention to delay or defraud his creditors. If this is proved, the court makes a preliminary order, called a "receiving order," which protects the debtor's property and prevents creditors from suing him without the leave of the court. The debtor may then (with the Court's approval) make a composition or scheme of arrangement with his creditors; but if this is not done, he will

[1] A married woman cannot be made bankrupt unless she is carrying on a trade apart from her husband. A corporation cannot be made bankrupt, but a company formed under the Companies Act 1908 or similar earlier Acts can be wound up and its property distributed according to rules similar to those applicable in bankruptcy.

be adjudicated bankrupt, and the whole of his property (not including property of which he is himself a trustee, or—up to the value of £20—the tools of his trade and the necessary clothing and bedding of himself and his family) will vest in the "official receiver" (a public officer) or some other trustee, and become divisible among his creditors who prove their debts. Rates and taxes, wages of clerks and servants, and some other claims are, within limits, paid in preference to others, and the rights of secured creditors, such as mortgagees, are not prejudiced by the bankruptcy; but in general the distribution will be made rateably. Voluntary settlements (in particular family settlements made after marriage) are set aside by a bankruptcy if made within two years before; and even if made within ten years before, unless it is shown that at the time the bankrupt was able to meet his liabilities without the settled property.

At any time after adjudication a bankrupt may apply to the court for his discharge, which, if granted, will enable him to start again, stripped of his property, but (with certain exceptions) free from any claim which might have been proved against him in the bankruptcy. But the discharge may be refused or postponed if he has been guilty of certain offences or misconduct in connexion with the bankruptcy,

or if his assets are insufficient for the payment of 10s. in the £, unless this is shown not to be due to the debtor's fault.

17. Wills.—Our modern law gives an unlimited power of disposition by will over all a man's proprietary rights which survive him, excepting only estates tail. Neither husband, wife, nor child have now any rights of succession which may not be defeated by will. This power is, however, in practice kept within limits by the custom of settling property in such a way that the person who is in the actual enjoyment of it commonly has no more than an interest for his own life.

For the making of a will compliance with the following formalities is now necessary: (1) The will must be in writing. (2) It must be signed at the foot or end by the testator or by some person in his presence and by his express direction. (3) The signature must be made or acknowledged by the testator in the presence of two or more witnesses, both present at the same time. (4) The witnesses must attest and subscribe the will in the testator's presence.

Soldiers on active service and mariners at sea can still make wills of personal property without compliance with these formalities, and even by word of mouth.

Any legacy or benefit given by the will

to a witness or to a witness's wife or husband is void, but the will as a whole is unaffected.

A will once made holds good until revoked. The revocability of a will is one of its essential characteristics, and a man cannot deprive himself of the power of making or revoking a will, though the breach of a contract to make or not to make, to revoke or not to revoke, a will subjects his estate to a claim for damages.

A will is revoked (1) by the marriage of the testator, whether a man or a woman. It is useless, therefore, to make a will in favour of an intended wife or husband or the issue of an intended marriage. (2) By the making of a new will or of a codicil [1] or other writing executed with the same formalities as a will, so far as such later document is inconsistent with the will. (3) By burning, tearing, or otherwise destroying a will, if this is done by the testator or any person in his presence and by his direction, with the intention of revoking it. (4) A complete and intentional obliteration of a will or any part of it, so that what was written can no longer be seen, amounts to a revocation of what is obliterated; but merely striking words through with a pen or altering them has no effect, unless the can-

[1] A codicil is really a supplementary will, and is generally used for making some alteration in a will without revoking it as a whole.

cellation or alteration is signed by the testator and attested by two witnesses like a new will.

The accidental loss or destruction of a will has no effect upon its validity, and its contents may be proved by the production of copies or drafts, or even by the recollection of persons who have seen it or heard it read.

Bequests of real estate are technically known as devises, bequests of personalty as legacies. A bequest of a definite sum of money is called a pecuniary legacy; a bequest of things specifically described (*e.g.* "my best gold watch," "my house in London," "half my L.N.W.R. stock") is a specific devise or legacy; a bequest of the surplus after providing pecuniary and specific bequests is a residuary devise or legacy. A specific bequest will hold good even though there is not enough to pay the pecuniary legatees; but it will fail altogether if the testator in his lifetime parts with the thing named. Residuary bequests, though, of course, postponed to those which are pecuniary or specific, will be increased by the failure of either of the latter. The interests of all persons who take under a will can, of course, take effect only after payment of the debts of the deceased; but (in the absence of contrary expression of intention by the testator) personalty is still in general primarily liable, so that it may

happen that those to whom real estate has been left will take the whole benefit, while legacies of personalty are diminished or extinguished to meet the testator's debts.

A devise or legacy will fail if the person for whom it was intended dies before the testator, except where a devise is made to a tenant in tail who leaves inheritable issue, or where a bequest of real or personal estate is made to the testator's child or descendant who leaves issue which survives the testator; in either case the devise or legacy takes effect as if the devisee or legatee had died immediately after the testator. In the latter case the issue of the person dying will not necessarily take any benefit, for he may have made a will, under which the property may pass to others; and if the testator's child is a married woman who dies intestate, the whole of her property will pass to her husband.

When a bequest fails through the death of the person for whom it was intended, and does not pass under a residuary bequest, as must necessarily be the case if the bequest which fails is itself residuary, the property will be dealt with as upon an intestacy.

18. Intestacy. — Where a person dies wholly or partly intestate, the distribution of the property will differ widely according as it is real or personal estate, if we except one

modern enactment. Under the Intestate Estates Act, 1890, where a man dies wholly intestate leaving no issue, his widow is entitled to a sum of £500, payable rateably out of his real and personal estates in proportion to their respective values, in addition to her other rights of succession to either class of property. If the whole of his property at the time of his death is not worth more than £500, she will in the like circumstances take the whole.

Real Estate.—On the death intestate of a freeholder of land in fee-simple the widow is entitled to "dower," *i.e.* an interest for her life in one-third of the land. On the other hand, a husband is entitled on his wife's death to an interest for his life (known as "curtesy") in the whole of her land, provided that issue of the marriage has been born, though it is immaterial whether such issue survives. Under some customs—notably the Kentish custom of gavelkind—the life-interests of husband and wife are interests in one-half of the land; the husband's interest is not conditional on the birth of issue, and the wife's interest continues only so long as she remains a widow and chaste.

Subject to the rights of the surviving husband or wife, the fee-simple land descends to the heir; it should be noted that the term "heir" is properly applied only to those who take real estate by descent, not to those who

succeed under a will nor to those who succeed to personal property. The most important rules for ascertaining the heir are as follows :—

1. In the first place, the land descends in the direct line to the issue, however remote, of the person from whom the descent is traced.

2. Males are always preferred to females.

3. When two or more persons equally nearly related are males, the eldest only inherits ; but where they are females they take equally as "co-parceners"—a form of co-ownership which bears some resemblance to joint tenancy, but without the right of survivorship.

4. A descendant who survives excludes his own issue, but the issue of a deceased person will represent him. Thus, if A leaves an elder son B who has issue, and a younger son C, B will be heir to the exclusion of his own issue ; but if B has died before A, B's issue will be preferred to C.

5. If no issue of the deceased can be traced, the heir must be found in, or traced through, some ancestor. Here also males are preferred to females, the elder male excludes a younger male of the same degree, while females equally nearly related take equally, and a deceased ancestor is represented by his issue. Thus a brother of the deceased will only take if the father is dead.

6. The father, his issue and his ancestors

(however remote), are preferred to the mother and her issue and ancestors.

7. A more remote male ancestor and his issue are *excluded* by a nearer male ancestor and his issue, but the mother of a more remote male ancestor and her issue are *preferred* to the mother of a nearer male ancestor and her issue.

8. Persons related in the half-blood are admitted next after those of the whole blood, if the common ancestor is a male, and next after the common ancestor who is a female.

It will be seen that in addition to the preference which these rules give to males over females, and to the elder brother over the younger, these rules provide that land shall go to the most remote relations on the father's side before it can go to the mother or to the half-brothers and half-sisters of the deceased on the mother's side. It would be hard to justify the continuance of such rules in a modern civilised country, and it is only the complete freedom of will-making which has prevented them from being found intolerable.

Another rule which, to say the least, serves no useful purpose, is that which prescribes that, in a case where the intestate himself acquired the land upon intestacy, the descent is to be traced not from the deceased owner, but from the last "purchaser,"

i.e. the last person who did not acquire the land upon intestacy. Thus, if A purchased land which on his intestacy descended to his son B, and B dies intestate, the descent must be traced not from B, but from A. The law on this point has, however, been modified by a statute which provides that if no heir can be traced from the last purchaser, descent shall be traced from the person last entitled.

In the absence of ascertainable heirs the land will escheat to the lord, *i.e.* in most cases to the Crown.

These rules are subject to the Kentish custom of gavelkind, under which males take equally but are preferred to females; and to other local customs, such as the custom of Borough-English, by which the youngest son is preferred, but as a rule this custom does not give any preference to the youngest among brothers or other collateral relations.

The descent of copyhold land is in the absence of any special custom similar to that of freehold land.

The descent of an estate tail is like that of a fee-simple, except that only issue of the original grantee of the estate can take, and that the descent may be expressly limited to males (or, it is said, to females), or to the issue of the first grantee by a particular wife or husband.

An estate *pur autre vie* will descend, so long as it lasts, like a fee-simple, if it is given "to A and his heirs during B's life"; if it is given simply "to A during the life of B," it will descend like personal property of A.

Personal Property including Leaseholds.— A husband takes absolutely the whole of his deceased wife's personal property on her death intestate whether or not she leaves any issue. A wife, on the other hand, takes absolutely one-third of her intestate husband's personal property, if he leaves issue, and a half if he leaves no issue. Even if there are no ascertainable relatives of the husband, the wife can take no more (except under the provision mentioned at the beginning of this section); the rest will go to the Crown.

Subject to these rights of husband and wife, other relatives of the deceased take in the following order :—

(1) The children of the deceased, sharing equally whether male or female. If a child of the deceased died before him, leaving issue, such issue take the share of the deceased child.

(2) In default of issue, the father of the deceased takes the whole.

(3) If the father is dead, the brothers, sisters, and mother of the deceased share equally; children of deceased brothers and sisters take the share which their parent

would have taken if living;[1] and brothers and sisters of the half-blood share equally with those of the whole blood.

(4) Other blood relations, nearer relations excluding those more remote. If several are equally nearly related, whether through the father or the mother, and whether of the whole or the half-blood, they share equally. No relation more remote than brother or sister is represented by his children. Thus, if the deceased leaves an uncle, and also first cousins, the children of a deceased uncle or aunt, the uncle will take to the exclusion of the cousins.

It will be seen that these rules are not only simpler, but, in spite of the excessive rights given to the husband and the father, far more equitable, than those under which real estate descends. For this and other reasons, the assimilation of the law of inheritance to that which governs the succession to personal estate is a reform which has long been called for, and ought to be undertaken in the near future.

19. Executors and Administrators.—Even if a will does not give property to trustees, the property, whether real or personal, does not (except in the case of copyholds)

[1] But brothers and sisters are not represented by their grandchildren or more remote issue. And by a curious anomaly, if neither the mother nor any brother or sister survives, the children of brothers or sisters do not represent their parents, but are postponed to the grandparents of the deceased.

now go directly to those for whose benefit it is given, nor does property passing on intestacy go directly to those entitled under the rules above stated. It vests in the first instance in the executor appointed by the will, or where there is no will or no executor appointed under the will, in the administrator — usually a person interested in the property—appointed by the Court. The Public Trustee may now be appointed as executor or administrator.

The executor or administrator, whose duties in many ways resemble those of a trustee, must in the first instance discharge the funeral expenses, the costs (including the payment of death duties) of obtaining probate of the will or "letters of administration," and the debts of the deceased. It is only after these claims are discharged that the executor or administrator will transfer the property to those entitled, or, if the property is settled by will and the executor is not himself trustee, to trustees for them. In many cases, as where the persons entitled are not of age, or not yet in existence, or not to be found, an executor or administrator will have to retain the property in his hands for a considerable time, though he may sometimes relieve himself by a payment or transfer into court, and in any case he can obtain the direction of the court when doubts arise as to the proper course which he should take.

CHAPTER VI

CONTRACTS

1. Acts in the Law.—To a large class of acts, conveniently comprised in the term "acts in the law," the law gives an effect which corresponds more or less completely with the intention of the person who acts. A purchaser of goods, for instance, desires to become the owner, or to have the right to become the owner of them, and is willing to be bound to pay for them, and this is precisely the legal consequence which the law attaches to his agreement to purchase.

For the most part, an act in the law will require for its full effect the concurrence of more persons than one, since a man can hardly alter his own legal position without affecting that of another or others. A man cannot be compelled against his will to accept even a benefit. Thus a gift or a legacy will fail if the intended recipient refuses to take it. Yet there is a special sense in which we may properly distinguish one-sided or "unilateral" transactions from those which are two-sided

or "bilateral." If a man should make a gratuitous promise to pay £100 to another, his promise, though made without the knowledge of the other, will, if made in the proper form, be so far binding on him that he cannot revoke it, though it is true that the other may repudiate the benefit and thus release him. But the promisor in the meantime is bound. Such a transaction is unilateral. On the other hand, where a transaction would impose on each party both a benefit and a burden, as in the case of a sale, neither will be found until both are bound: until that moment is reached, either can withdraw. Such transactions are bilateral.

2. Conveyance and Contract.—Among acts in the law we must sharply distinguish in principle the two types of conveyance and contract. In the case of a conveyance, the effect of the transaction is, so to say, exhausted as soon as the transaction is complete, and no special relation remains outstanding between the parties. A gift makes the recipient owner of the thing given as fully as the giver was previously. The giver must respect his proprietary rights; but this duty is no more than what is owed by every one else. The new owner has no rights against him which he has not against all the world. Such a transaction is purely a conveyance. On the other

hand, an agreement by which one man agrees to serve another who undertakes to pay him wages, creates between them special duties of the kind technically known as obligations, duties which at least in the first instance can be enforced only by and against the parties to the transaction. Such a transaction is the purest type of what in English law is called a contract.

Clear as is the distinction in principle between these two types, we shall find that many, if not most, ordinary transactions contain elements belonging to both, and the assignment of a transaction to the one class or the other is often a matter of difficulty, and cannot always be made in accordance with strict logic. An agreement for the purchase of land seems at first sight to be purely a contract; it gives the purchaser not the ownership of the land, but a right to be made owner, while it imposes on him the duty of paying the purchase-money. Yet, under the doctrines of equity, from the moment of the purchase, he acquires a proprietary interest in the land which he can enforce, not indeed against all the world, but against every one who has not taken a conveyance from the owner, for value and without notice of the purchase. Again, when the purchase is completed by a formal conveyance,

some special duties may remain incumbent on the seller to make good any defects in the title. A lease is mainly a conveyance and is classed as such in that it gives the tenant a right to the land, which, during the tenancy, is good against all the world; yet the tenant's covenants for payment of rent, or to keep the premises in repair, are essentially contractual obligations. A sale of goods is mainly a contract; yet many sales of goods immediately transfer the ownership to the buyer and give him rights against the world at large.

For practical purposes of classification, however, it is as a rule not difficult to place a transaction in one class or the other according as it corresponds more or less completely with one type or the other. Of conveyances something has been said in connexion with the law of property; they are different for different classes of property, and in many cases subject to special requirements of form. Contracts, on the other hand, while infinitely various in their subject-matter, have much in common as regards their formation and the conditions of their validity. It must be remembered that much that will here be said of contracts, especially when we come to speak of the effects of mistake, fraud, misrepresentation or illegality, is equally true, or true with variations, of conveyances in so far

as their force, like that of contracts, depends on agreement.

3. Formal Contracts.—A contract may be described as a transaction which consists wholly or mainly of a legally binding promise or set of promises. No promise is binding in our law unless it either satisfies certain requirements of form, or is given for valuable consideration. Though classed among formal contracts, the so-called "contracts of record" which owe their force to an entry in the records of a Court of Justice, are for the most part not contracts at all. A person who has had a judgment given against him has not really contracted or promised, though he is bound, to satisfy the judgment. Yet occasionally, as where a judgment is entered by consent as the result of a compromise, the judgment does embody a real agreement, and we may in such cases see a genuine contract deriving force from its judicial form. So, too, in the case of a recognisance, which is a promise made to the Crown to pay a sum of money in the event, for instance, of an accused person failing to surrender for trial.

But the commonest kind of formal contract is the contract by deed or sealed writing, sometimes known as a specialty. The promises contained in such a document are known as covenants. The formality of sealing

(now much attenuated in practice), which served as a test of genuineness in former days when illiteracy was common in all classes and handwritings hard to distinguish, still serves to call attention to the solemnity of the transaction, and affords evidence that the person who executes the deed seriously intends to bind himself. But to become operative, a deed, in addition to sealing, needs to be "delivered." Delivery is formally made by using some such words as, "I deliver this as my act and deed," in the presence of another, and handing the document to him; but any acts or words which sufficiently show an intention that the document should take effect are sufficient. A delivery may be made conditionally, *i.e.* it may be accompanied by a declaration that the deed shall take effect only when some condition is fulfilled, and a deed so delivered is called an escrow. A written signature is in practice always added, and though it would seem to be not essential to the validity of a deed, its absence would afford strong grounds for suspecting that it had not been duly executed.

4. Consideration.—Apart from the requirement of a deed for the contracts of corporations, the main use of a deed for purposes of contract is to enable a man to

bind himself by a gratuitous promise. A promise to pay money, or to perform a service, or confer any benefit, unless made by record or by deed, has no binding force if the promisor gets no "consideration" for the promise. The consideration is an act or forbearance of the other party, or the promise of some act or forbearance, accepted by the promisor in return for his promise. Thus, in a sale of goods, the supply of the goods, or the promise to supply them, will be a consideration for the promise to pay; and the promise to pay, or a cash payment, will be the consideration for the promise to supply them. Whether the consideration is of any actual value, or actually benefits the promisor, is immaterial. The delivery of the most trivial object by A to B, or the doing of a trivial act at B's request, may be a consideration for B's promise to pay A a large sum of money. The makers of a remedy for influenza offered by advertisement £1000 to any one who should use it for a specified period and contract the disease. A lady who so used it, and caught influenza, was held to have furnished the consideration for the promise. It is enough, but it is essential, that the promisor has got something which he had not got before, and which he had no legal right to require. A promise made in return for a previous service

is not binding; "a past consideration" is no consideration, for the promisor gets nothing for his promise which he had not got already. So, again, the doing, or the promise to do something which one is already bound to another to do, is no consideration for any promise of the latter. If I owe a man £10 to-day, and he undertakes, if I will pay him £5 now, to let me off the rest of the debt, his undertaking is of no effect, for he was already entitled to the £5. It would be otherwise if the money was not due till to-morrow, and he agreed to take less in consideration of a present payment. So, too, when a person is under a public duty, his performance of the duty is no consideration, as where a policeman in discharge of his duty furnishes information for which a reward has been offered. Nor is the abstention, or promise to abstain, from unlawful conduct, consideration for any promise. An act, or the promise of an act, which is unlawful, or even immoral in a sense recognised by law, not only is no consideration, but will even vitiate a transaction in which some other sufficient consideration is present.

5. Offer and Acceptance.—The formation of a contract commonly proceeds by way of offer and acceptance. One man will propose to another to make a promise to him, asking in return for the doing of some act,

or the making of a counter-promise. Such a proposal is called an offer. In itself it has no binding effect on either side, and may be withdrawn at any moment before it has been accepted. It will fail if more than a reasonable time elapses before it is accepted, or if either party dies before acceptance. Even an express declaration that the offer shall remain open till a certain time will not be binding unless it was made by deed, or something was given as a consideration for it, as in the case of Stock Exchange options. The most that such a declaration can do is to make sure that unless revoked the offer shall not fail from mere lapse of time before the time specified, nor continue open afterwards. If the offer is accepted it is converted into a binding promise. The acceptance may be made by words written or spoken, or by conduct showing an intention to accept. If a counter-promise is proposed as the consideration, the acceptance amounts to a giving of the counter-promise; if the consideration proposed consists of an act, the acceptance will consist of the doing of the act—*e.g.* A offers a reward for the furnishing of information; B supplies the information, and thereby at the same moment supplies the consideration asked for by A and converts A's offer into a promise.

Neither an offer nor its revocation can be made without communication to the other party. If one man should offer by advertisement to pay £5 for a rare book, and another, not knowing of the offer, should happen to send him a copy of the book at that price, there would be no contract, for the offer was never made to him. Similarly, one to whom an offer has been made, so long as it has not lapsed, is entitled to treat it as open till he has actually received notice that it is revoked. On the other hand, communication is not necessary for the acceptance of an offer. The offer may, of course, prescribe communication as essential to a valid acceptance. But it may often be inferred from the nature of the offer and the circumstances under which it is made, that actual communication is not required. This is commonly the case where acceptance is to be made by doing an act. An automatic machine placed in a public place is a standing offer on the part of the company which puts it there of promises to supply articles in return for the act of placing a coin in the machine. Every person who puts in a coin accepts the offer, and imposes on the company the duty of supplying the promised article. So, too, the lady who unsuccessfully used the influenza remedy was held to have thereby converted the makers' offer

into a promise, though her very existence was at the time of her doing so unknown to them. In the case of contracts made by correspondence, our courts have laid down the rule that the posting of a letter of acceptance is a complete acceptance, even if the letter is lost in the post. It follows that a revocation will be inoperative if it does not reach the acceptor before his acceptance is posted.

6. The Statute of Frauds.—Contracts other than those by record or under seal are commonly called simple or parol contracts. The latter phrase, meaning "oral," was used in contradistinction to contracts under seal, inasmuch as our early law paid no attention to writing unless it was authenticated by seal. The Statute of Frauds, 1677 (sections 4 and 17), however, imposed on a number of simple contracts a requirement that the contracts themselves, or some note or memorandum thereof, should be in writing signed by the "person to be charged" or his agent. The contracts for which writing is required are still a division of simple or parol contracts, and compliance with the requirements of the statute does not dispense with the necessity for consideration. Moreover, the statute does not affect the formation of the contract, but only prescribes that it shall not be proved except by certain evidence. An oral con-

tract falling within the Act is a valid contract, and if a signed note or memorandum of it is afterwards made, it will become enforceable. If the "person to be charged" (the defendant) has signed, it is immaterial that the other party has not signed. The object of the Act was to put a stop to "frauds and perjuries," which, it was feared, would become common in consequence of the recognition—at that time still comparatively recent—of the enforceability of informal contracts; but it may be doubted whether the encouragements which it has given to bad faith is not a greater evil. It has certainly given rise to an enormous amount of litigation. The courts have so interpreted it as to restrict its operation as much as possible, and in so doing have at times done some violence to its provisions. The contracts included in the 4th section are (1) contracts by an executor or administrator to pay the liabilities of the deceased out of his own estate—an unimportant class, since the absence of consideration will in most cases make the promise of no effect; (2) contracts of guarantee; (3) agreements made in consideration of marriage—meaning agreements to pay money or settle property upon marriage: a promise to marry, for which the consideration is the corresponding promise of the other party, is

not within the statute, though it is subject to a rule which requires the evidence of a plaintiff who sues upon such a contract to be corroborated by writing or some other material evidence; (4) contracts relating to interests in land; (5) agreements not to be performed within a year from the making thereof. The Court of Chancery nullified the effect of the statute in some cases which fell within its jurisdiction to grant specific performance (*e.g.* in cases of contracts for the sale of land), by holding that where there had been a part performance, as by giving and taking possession, a contract might be specifically enforced even in the absence of writing. The scope of the provision as to agreements not to be performed within a year has been much restricted, by excluding from it contracts which were completely performed on one side within the year, and contracts for an indefinite period, such as for life, which might terminate within the year. The 17th section (now incorporated in the Sale of Goods Act, 1893), which required writing for contracts for the sale of goods of the value of £10 or upwards, contained an exception in cases where the buyer accepted and received the goods, or part of them, or had made some payment. Here "acceptance" was judicially interpreted, and is now defined by statute to mean, "any act in relation to

the goods which recognises a pre-existing contract of sale," so that for this purpose an examination of the goods, followed by a rejection under the belief that they are not up to sample, may amount to an acceptance.

7. Mistake.—The cases in which mere mistake has any effect upon the validity of a contract are comparatively few—fewer probably than in most other systems of law. In the case of a sale, for instance, we do not attempt to make any distinction between a mistake as to quality and a mistake as to substance. A person who has bought a specific piece of plate cannot avoid his bargain because he believed it to be of old workmanship when in truth it was modern, or gold when it was really silver-gilt. It makes no difference even that the seller knew of his mistake, so long as he did nothing to cause or confirm it. If, however, the buyer thought not merely that the thing was different from what it really was, but that the seller was undertaking that it had some quality which it had not, and the seller knew of his mistake, he cannot hold him to his bargain.[1]

[1] Of course if the seller promises an article of a certain kind and supplies one of a different kind, the purchaser need not accept it; but here there is no mistake but a default in performance. The contract holds good, and the purchaser can recover damages for the default.

Somewhat similar is the converse case, where a man offers more than he means to offer (as by a mistake in writing figures), and the other party accepts the offer knowing that it has been made by mistake. The most important cases in which the mistake of one party will make a contract void are where there is a mistake as to the whole nature of the transaction (as when a man signs a bill of exchange believing that he is signing a guarantee, or that he is signing merely as a witness), and where there is a mistake as to the identity of the other party (as when an order for goods is sent, to which the sender has forged the name of another). Such cases can hardly arise except through fraud; but whereas a fraud in itself does no more than give the person deceived the right to avoid the contract—a right which cannot be exercised against an innocent third person who has acquired ownership under it for value—a mistake of the kind mentioned is held to prevent the formation of any contract at all, so that even innocent third persons can acquire no rights. Thus in the case of the forged order the seller could recover the goods even from an innocent person who had purchased from the forger; if the goods had been obtained by a false representation—say as to the credit or solvency

of the buyer—the innocent purchaser from him would have been safe.

A mistake common to both parties as to the existence of what is contracted for—*e.g.* a sale of a life policy or of an annuity, when the life in question has already ceased—will make the contract void, and what has been paid under it may be recovered. Where there are two things which equally answer the description of the thing contracted for—two ships, for instance, have the same name—and each party is thinking of a different one, it has been held that there is no contract. It is possible, but not clear, that the same would be held when a thing is sufficiently described by the one party, but the other makes a mistake as to what is intended—*e.g.* at a sale by auction a man through deafness bids for one lot thinking that another is being offered.

8. Misrepresentation and Fraud.—A misrepresentation made by one person to another with the purpose and effect of inducing him to enter into a contract with the former will entitle the latter to avoid the contract, if it is a misrepresentation as to some material fact, such as the quality of goods to be sold, the character or credit of a person to be dealt with. A statement of opinion or intention is not and does not become a misrepresentation because the

opinion turns out to be mistaken or the intention is not carried out; but the existence of the opinion or intention is a matter of fact, and a false representation that it exists may well be a material misrepresentation. If a representation is not merely false, but is known to be so to the person who makes it, or is made by him recklessly without knowing or caring whether it be true or false, it is called fraud or deceit. For the mere purpose of giving a right to avoidance of the contract it makes little difference whether a misrepresentation is innocent or fraudulent, save that it will be harder to resist the inference that a fraudulent misrepresentation was made for the purpose of inducing the contract. Where, however, a transaction has been completed by conveyance, it appears settled that an innocent representation will not, while a fraudulent one will, give a right to have it set aside.

In general there is no duty requiring a party to any intended contract to make a disclosure to the other of material facts which might affect his judgment. But there are special kinds of contract (*uberrimæ fidei*)—notably contracts of insurance—in which the facts are usually so much more within the knowledge of one party, that the law imposes on him the duty of disclosure, and gives the other a right to avoidance if the duty is not

discharged. In contracts for the sale of land or goods, the vendor is bound to give a good title, subject to such exceptions as may be provided for by the conditions of sale; and the existence of an undisclosed defect in the title may give the purchaser a right to repudiate, though rather as a breach of the seller's duty under the contract than as a failure in a duty antecedent to it. The same is true of the conditions as to merchantable quality and fitness which, in certain circumstances, are implied in a sale of goods.

Duress and undue influence have effects similar to that of fraud: the former consists in actual or threatened violence or imprisonment inflicted by the one party on the other or members of his family, the latter of an unconscientious use of power arising out of confidential relations (like those of parent and child or solicitor and client), or out of special circumstances which put one party in a position of great disadvantage towards the other.

The right to avoid a contract, and even a transaction completed by conveyance, on any of the grounds above mentioned, is subject to the rights acquired by third persons for value and in good faith, and to the possibility that the right of avoidance may be lost by a positive confirmation

of the transaction, or by acquiescence in it after the cause which induced it has ceased to operate.

9. Illegality.—It is obvious that no system of law could enforce a promise to commit acts, such as crimes or even civil wrongs, which are contrary to law. The same is true of contracts for the commission of acts, such as sexual immorality, which the law seeks to discourage, though it does not punish. Contracts of these kinds are said to be void for illegality, and the invalidity extends to the whole contract, including the counter-promise of acts innocent in themselves, such as a promise of payment, for which the illegal or immoral act or the promise of it forms the consideration. But the term illegality as applied to contracts has a wider scope in its application to contracts which the law holds void, not because what is promised is illegal or immoral, but because in some cases it is contrary to the policy of the law that a person should be bound to observe his promise. It is not illegal or immoral for a man to refrain from trading in any part of the United Kingdom or to cease to trade at all; but it is contrary to public policy that he should bind himself to abstain from trading either generally or within limits wider than are reasonable under the circumstances, and a

contract in general or unreasonable restraint of trade will be held void. It would be an unreasonable restraint if an Oxford grocer, on selling his business, undertook to carry on no similar business within a radius of 150 miles. It has been held not unreasonable for a manufacturer of munitions of war, upon selling his undertaking, to agree not to carry on certain classes of business in any part of the world. It is not illegal or immoral to pay money lost on a wager; but the practice of making wagers is discouraged by statutes which allow no action to be brought upon any wagering contract. Second marriages are neither illegal nor immoral; but a promise by a married man to marry another, if his present marriage should be terminated, is void. So, again, a man may lawfully commit the custody of his children to another; but he cannot bind himself not to resume the control or fetter his liberty of deciding as to their religious education.

Where property has been transferred or money paid under an illegal contract, the law will in general give no assistance to a party who seeks to recover it. Bets once paid cannot be got back. A conveyance of property by way of settlement on a woman with whom the settlor had gone through the ceremony of marriage—the marriage being

void under the law which formerly prohibited marriages with a deceased wife's sister—could not be set aside at the suit of his representatives after his death. But the same rule is not applied where money has been deposited with a stake-holder to abide the result of a wager: the depositor, who has lost, may reclaim his deposit at any time before it has been paid over to the winner. Nor is the rule applied where the illegal purpose has as yet been in no way carried out (as in the case of a transfer of property with a view to defrauding creditors), or where the party who claims to recover is the less guilty of the two (such as a woman who paid money to a matrimonial agency, in return for which she had obtained introductions to possible suitors).

10. Limits and Extensions of Contractual Rights and Duties.—The rights and duties under a contract are, in the first instance, limited to the parties to it. If A promises a sum of money to B, no one but A is liable, and no one but B can claim. Even if the promise is made by A to B that A will pay C, C acquires no rights; the fact that C would benefit if the contract were performed will not alter the situation. So if a landlord promises his tenant to repair the house, and for default of repair a visitor to the house is

injured, the latter will have no claim against the landlord. But this limited operation of contract may be extended in various ways. We have already seen that a contract made by an agent may place the principal in the same position as if he had himself made the contract. So, too, rights under a contract, in so far as they are not of too personal a nature, may form the subject of an assignment or trust which will enable the assignee or beneficiary to enforce them. Such rights and the corresponding obligations will also pass upon the death of a contracting party to his representatives.

The benefit and burden of covenants which "touch and concern" land are in many cases treated as annexed to proprietary interests in the land, and pass or "run" with them. The application of this principle to the covenants in leases has already been mentioned.[1] In the case of sales of land the benefit of the vendor's covenants for title "runs" with the land purchased. So, too, the benefit of covenants, and even of less formal agreements, between adjacent owners relating to the erection of buildings or the use of land may pass with the land for the benefit of which they are entered into. The burden of such covenants or agreements will,

[1] See p. 136.

however, bind a subsequent owner only if the obligation is negative—*e.g.* a covenant *not* to build a house worth less than £1000, but not a covenant to build a house of that value—and even so it will not bind a purchaser for value who at the time of his purchase had no notice of the obligation.

11. Negotiable Instruments.—Negotiable instruments, which include bills of exchange, cheques, and promissory notes, were transferable by the custom of merchants, and their transferability has long been recognised by our courts. To take the most familiar example, a cheque is an order for payment of money on demand, drawn on a banker, and expressed to be payable either to bearer or to a named person or his order. As between the drawer and the payee it is a promise by the former to pay money to the latter. If it is payable to bearer, the rights of the holder may be transferred by him by merely handing over the cheque. If payable to order, the payee can transfer his rights only by indorsement, *i.e.* by signing his name on the back. If he so signs without more, the indorsement is said to be in blank, and the cheque becomes payable to bearer. He may, however, make a special indorsement, *i.e.* direct payment to some other named person, who must again indorse. When a cheque is transferred, whether

by delivery or indorsement, it is said to be negotiated, and negotiation is a kind of transfer which differs in important respects from the ordinary assignment of a contractual right. In the first place, any holder of a cheque to bearer—even a thief—can give a good title to one who takes from him for value and in good faith; it passes like money. In the second place, a transfer by indorsement gives a good title to the indorsee who takes in good faith and for value, free from any defences on the ground of fraud, duress, or illegality, which might have been available against the indorser, except that a holder who is shown to have been a party to such fraud, duress, or illegality cannot recover. Further, we may notice that the rule as to consideration receives considerable modification in respect to negotiable instruments. A cheque given gratuitously, it is true, creates no rights between the drawer and the payee if the former can prove the absence of consideration. But a subsequent holder who has given value for it is in as good a position as if value had been given by the original payee, and a gratuitous transferee from the holder for value is in an equally good position. It may thus come about that a holder who has given nothing for a cheque can successfully sue a drawer who has received nothing: it is sufficient that once

in the cheque's career value has been given. It is presumed in favour of a holder in due course that value has been given; but if once it is shown that the drawing or negotiation has been affected by fraud, duress, or illegality, the burden of proof is reversed, until it is shown that subsequently value has in good faith been given.

12. Breach of Contract.—Any failure to perform what is promised is a breach of contract, which will give the injured party the right to bring an action in which he will recover damages. In general, damages will be of such amount as to place him, so far as money can do it, in the same position as if the contract had been performed—subject, however, to the rule that damages are not to be given for losses of an extraordinary kind, such as the parties could not be presumed to have contemplated at the time of entering into the contract: *e.g.* a purchaser of goods who, unknown to the seller, has agreed to sell them again at a large profit, is not entitled, if the seller fails to deliver, to charge him with the loss of profit, but only with the difference between the contract price and the price at which other goods of the same kind might have been bought in the market when the breach occurred. In some cases the damages allowed by law are

merely nominal: for instance, for failure to pay a debt at the time agreed, nothing beyond the amount of the debt itself can in most cases be recovered. On the other hand, in the case of breach of promise of marriage, damages, which may far exceed the pecuniary loss, are given as a compensation for injured feelings. A contract sometimes provides that a certain sum shall be paid on breach, and rules have been laid down for determining whether such a sum is to be deemed a penalty, recovery of which will be refused, or is liquidated damages, *i.e.* represents a prospective assessment of the probable loss, and can be recovered. The decision will turn only to a slight extent on the question whether the expression "penalty" or "liquidated damages" has been used in the contract.

Negative duties under a contract may also be enforced by means of an injunction, an order of the Court forbidding the doing of an act. In certain cases a positive duty may be enforced by order for specific performance, a remedy which is almost confined to contracts for the sale or conveyance of interests in land, and for the transfer of other property which is so unique or rare that damages would be an inadequate remedy. The court has a discretion in granting an injunction and an order for specific performance, and in

exercising the discretion will have regard to all the circumstances of the case, and in particular to the conduct of the party asking for it. Non-compliance with an order of either kind will be punished by imprisonment.

13. The Termination of Contractual Rights and Liabilities.—Not to mention that the rights and duties which arise under a contract come to an end when they are satisfied by performance, we may notice that a contract will often expressly provide that its force shall cease upon the happening of a specified event. Further, it may appear from the terms of a contract that the parties contemplated the continuance of a state of things as the basis of it, and in such a case the obligations of the contract will cease as from the time when that state of things ceases. Contracts for personal service are thus dependent on the continued life and health of the person who has promised his services, and as a rule on the life of the employer. The principle was pushed to great lengths in the case of contracts for seats to view the coronation of King Edward vii which could not take place on account of the King's illness.

The failure by one party to perform his obligations under a contract does not necessarily release the other; but it may do so

where a condition to this effect is expressed or can be implied in the contract; where the failure amounts to a complete repudiation, or renders it impossible for the other to perform, or where it is so complete as to deprive the other of the whole substantial benefit of the contract.

An impossibility of performance created by a change in the law puts an end to duties under a contract. Other cases in which it is said that impossibility arising after the making of a contract puts an end to it, seem to fall under the principle above stated, which applies where the parties have contemplated the continuance of some state of things as the basis of it.

The parties may agree after the making of a contract, and even after its breach, to put an end to their rights and liabilities. Such an agreement is governed by the ordinary principles relating to the formation of contracts. It follows that where there are outstanding liabilities on both sides, a mutual discharge is good in whatever form it is made, because the discharge which each gives is a consideration for the discharge given by the other; where there is a liability on one side only, the other can give up his rights only by deed, or in return for some new consideration. If the right which is to be discharged is a

right of action for breach of contract, it is said that the consideration must be a performance and not merely a promise, and the right is then said to be discharged by "accord and satisfaction." The limits of this rule are obscure, but it seems clear that for the purpose of it the execution of a negotiable instrument is a sufficient performance.

The right of action for breach of contract is put an end to by the lapse of 6 years from the breach, in the case of a simple contract; 20 years in the case of a contract under seal; but claims for money secured by deed upon land are barred at the end of 12 years. The right of action for a debt may be kept alive or revived by a part payment or payment of interest, or by a written promise of payment or acknowledgment signed by the debtor. The period then begins to run afresh from the date of the payment or writing.

CHAPTER VII

TORTS

1. General Conditions of Liability.—While English law has developed a system of comprehensive rules relating generally to the formation, validity, and effect of contracts, and has laid comparatively little stress on the differences arising between various kinds of contracts from the nature of their subject-matter, it cannot be said that we have at present any systematic doctrine of liability for wrongs which are independent of breach of contract and trust. An account of the law of torts must consist largely of the enumeration and description of the principal specific torts which the law recognises. With regard to what is here said of the general conditions of liability for tort, it must be borne in mind that these general conditions are not in themselves sufficient to create a liability in respect of any act unless the act falls within some recognised head of tort.

(*a*) *Intention.*—The consequences of an act may be said to be intended when the person

acting contemplates that they will necessarily or probably follow from it, whether that consequence be desired for its own sake or not. It is said that a man is presumed to intend the probable consequences of his acts, but failure to anticipate probable consequences is really negligence rather than intention, and if the saying is more than a rule of evidence for ascertaining intention, it only means that for some purposes negligence, no less than intention, creates liability.

Intention is the most general condition of liability for tort, since it is clear that while some torts cannot be committed unintentionally (*e.g.* fraud), any act which is a tort at all will be one if intentionally committed.

There has been in recent years some tendency to the formation of a rule that in the absence of just cause or excuse the intentional causing of damage involves liability, and the acceptance of this rule would amount to a general theory of liability, which would dispense in a number of cases with the necessity of inquiring whether a given act did or did not fall within some recognised head of tort. The doctrine cannot, however, be said as yet to have been accepted as part of our law; and since it is clear that in many cases the intentional infliction of damage is lawful (as in cases where one trader cannot

increase his custom without diminishing that of his competitors), the adoption of such a rule would involve the necessity of forming a list of "just causes and excuses."

(*b*) *Motive and malice.* — The motive with which an act is done is for the most part immaterial. A lawful act does not become unlawful because it is done with a bad motive, such as ill-will, nor is an unlawful act excused because it is done with the best of motives. There are, however, some kinds of tort in which malice forms, or appears to form, an essential ingredient.

The right enjoyed by every citizen of prosecuting criminals is given for the purpose of vindicating law and justice, and a prosecutor who uses his right for the purpose of ill-will or extortion, or for any other than the proper purpose, will (if certain other conditions are also present) incur liability for malicious prosecution.

In claims for defamation the plaintiff alleges that the words spoken or written were published "maliciously," but this phrase has nothing to do with motive, and merely denies by anticipation the existence of any ground of defence. On the other hand, when a defence of privilege is raised, and this is answered by an allegation of "express (or actual) malice," the answer amounts to saying that the

defendant has used his privilege for some purpose other than that for which the law allows it.

(*c*) *Negligence.*—Negligence has been defined as "omitting to do something which a reasonable man would do, or the doing of something which a reasonable man would not do"; more shortly, one may say that it is a failure to use proper care in one's conduct. Negligence will in general involve liability for damage caused by it, but before we can say that there has been negligence of which the law will take account, one must make sure that there is a legally recognised duty to take care. Thus it has been held that a person is not (apart from contract) under any duty to take care that his statements are true, and therefore a person who makes a misrepresentation incurs no liability for the damage caused by it, as long as he honestly believed in its truth, though without reasonable grounds for his belief. A telegraph company is under no duty to the recipients of telegrams to take care that messages are correctly transmitted. So too an owner of land is under no duty to take care that the growth of thistles upon it shall not cause damage to his neighbours.

It would be impossible to enumerate the occasions on which a duty to take care arises, nor has the law exhaustively defined them;

but we may notice the duty of persons who use vehicles upon the highway ; the duty of owners of premises to prevent them from being a source of danger to those upon the highway, or to neighbours, or to persons who resort to them at the owner's invitation ; the duty of persons who deliver goods to others to take care that they are free from danger, or, in some circumstances, to warn them of any known defect; the duty of persons to whom goods are delivered to be used or dealt with, to take care to prevent damage to them. The extent and degree of care necessary will vary according to the circumstances, but there is no sharp line of division such as is suggested by the use of such terms as " gross " or " slight " negligence.

Where a person has caused dmaage by negligence, but the person who suffers has himself been guilty of negligence which has contributed to the harm, the latter may be disentitled to relief on the ground of " contributory negligence." The rule appears to be that if both are at fault, but one had the last opportunity of avoiding the accident, he will be liable for any damage suffered by the other and disentitled to recover for any damage suffered by himself. Where it is impossible to apply this test it seems that neither can recover against the other.

(*d*) *Liability independent of intention or negligence.*—In some exceptional circumstances a person may incur liability for damage which is not intentionally caused by him nor due to any negligence on his part. Thus a person who creates a dangerous state of things upon his land, as by the construction of a reservoir, will be liable for damage resulting to others, if, for instance, the reservoir bursts, although he has used every precaution to avoid such damage, unless indeed the accident is due to some natural event of extraordinary violence (known as an "act of God"), such as a flood caused by exceptional rainfall. The person who keeps a wild animal of a savage kind, or even a domestic animal which is known to him to be savage—for instance a dog which he knows to have bitten human beings—will be liable for damage done by it, whatever care he may have used to keep it safely. Further, a statutory liability has been imposed on the owner of a dog for damage done by it to animals, even if he had no knowledge of its propensity to do such damage. So, too, a man is liable for damage done to crops by his horses and cattle straying from his land.

The liability imposed by the Workmen's Compensation Act, 1906, on an employer for injury or death of his workman caused by an accident arising out of and in the course of

his employment, is another instance of liability independent of intention or negligence.

(*e*) *Damage and damages.*—In some cases the mere infringement of a right is itself a cause of action, though there may have been no pecuniary loss and not even any appreciable harm done, as in the case of trespass to land or goods. Here, if no actual damage is proved, and there are no circumstances of aggravation, such as insulting conduct, only nominal damages are recoverable. Somewhat different are the cases of injurious acts, such as libel or malicious prosecution, which are actionable without proof of any pecuniary loss, and for which heavy damages may be given, having regard not only to any pecuniary loss, but to the injured feelings of the plaintiff and the improper conduct of the defendant. Again, in the majority of cases of slander, no action lies, unless "special damage," in the sense of some pecuniary loss, is proved; but the damages recoverable are not limited to the amount of such "special damage." Lastly, in the case of a number of torts (*e.g.* deceit), proof of actual damage is both a condition of actionability and the measure of the damages recoverable.

Subject to the direction of the judge and the possibility of an appeal where the damages given are inconsistent with the evidence, the

amount of damages is determined by the jury. Where the continuance or repetition of a tort is threatened, it may be restrained by injunction.

2. Termination of Liability.—(*a*) *Death of either party.*—At Common Law, the death of either party put an end to claims in respect of a tort, and this rule applied even if the tort itself caused the death of the injured party. The only exception which the Common Law allowed to this rule was that the representatives of a deceased person might be sued for property which he had wrongfully appropriated. The following further exceptions have been made by statute :—(i) damages for injury to personal property of the deceased may be recovered by his representatives ; (ii) damages for injury to real property of the deceased may be recovered by his representatives, if the injury was committed within six months before the death of the deceased, and the action is brought within one year after the death ; (iii) where death is caused by a tort, an action for damages may be brought by or on behalf of near relations of the deceased who were dependent on him ; (iv) damages may be recovered against the representatives of a deceased person for injuries to real or personal property committed by him within six months

before his death, if the action is brought against his representatives within one year after they enter on office; (v) claims under the Workmen's Compensation Act, 1906, for injury or death may be brought against the representatives of a deceased employer.

(*b*) *Limitation of actions.*—In general an action of tort must be begun within six years of the commission of the tort, subject to the following exceptions :—

Actions for trespass to the person (*i.e.* assault, battery, and false imprisonment) must be brought within four years of the commission of the wrong. Actions for slander by words actionable without proof of special damage must be brought within two years. Actions against any person or body for any act or default done in execution or intended execution of an Act of Parliament (*e.g.* an action for personal injuries caused by the negligence of the London County Council in working its tramways) must be brought within six months. Claims to the possession of land must be brought within twelve years after the wrong-doer, or those under whom he claims, first took possession; but if the person in possession gives a written acknowledgment of the claimant's title before the period has elapsed, the period begins to run again.

3. Specific Torts.—(*a*) *Wrongs to personal*

safety and liberty.—"The least touching of a man in anger is a battery," and any direct application of force to a man's person, whether intentional or negligent, is an actionable wrong. The attempt and even the threat of immediate violence where there is something more than mere threatening language, and there is present power and intention to do violence—aiming a gun, for instance, or shaking one's fist in a man's face—is also actionable, and is known as an assault, a term which, in its strict legal sense, is distinguished from a battery.

Further, any intentional or negligent doing of actual harm to a man's person, though it may be indirect and not amount to a battery, is an actionable wrong, as where injury is done by placing an obstruction on a highway, or where a medical man does harm through want of care, care including the use of such skill as belongs to his profession. Where illness is caused by apprehension of harm—a person, for instance, is nearly but not quite run into by a negligent driver—damages may be recovered in respect of the illness, though not for the mere mental distress.

"Any restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison," and where such imprisonment is not legally justified it amounts to the wrong of false imprisonment.

The restraint must, however, be complete. There is no imprisonment if a person is prevented from going in one or more of several directions in which he has a right to go, so long as it is left open to him to go with reasonable safety in some other direction. Not only confinement or restraint by physical force, but the show of a pretended authority to arrest, if it is complied with, amounts to an imprisonment.

Interferences with a man's person or liberty are of course justified on many grounds. Parental powers of chastisement and coercion, —a husband has no such power over his wife, —the lawful punishment of criminals, the restraint of persons of unsound mind, are familiar instances. As regards the arrest of suspected criminals, we may note that it is the right even of a private person to arrest for felony without a warrant, but the right is exercised at considerable risk, for if the prisoner's guilt cannot be proved, the person who arrests him can only justify himself by showing not only that he had reasonable grounds of suspicion, but that a felony was actually committed by some one. A constable who makes an arrest in the like circumstances is justified by merely showing reasonable grounds of suspicion, and in other respects has considerably larger powers to arrest.

Consent to an act (*e.g.* the voluntary undergoing of surgical treatment, provided it is carried out with proper care and skill) and the voluntary incurring of risk, as in the case of those who engage in a lawful game, are of course defences to any claim on the ground of tort. In the relation of employer and workman, this principle has been pushed far by the presumption that the workman has voluntarily incurred certain risks incident to the employment. He is not entitled at Common Law to recover damages against his employer for injury caused either (i) by the fact that the employer's works, machinery, and appliances, which were proper when first provided, have since become unsafe, unless it is shown that they have become unsafe to the actual knowledge of the employer himself, and without the workmen's own knowledge; or (ii) by the negligence of any servant of the same employer and in the same employment. This does not, however, prevent an employer from being liable for his own negligence in failing to provide proper machinery and appliances, or in failing to superintend the work properly himself or to select proper persons to do so. The Common Law rule is still in force, and applies when any proceedings are taken by a workman against his employer outside the

Employers' Liability Act, 1880,[1] or the Workmen's Compensation Act, 1906.

(*b*) *Libel and slander.*—The publication of a defamatory representation is a libel, if it is made in writing or by some permanent sign, such as an effigy; it is a slander if made by word of mouth, or probably by such signs as gestures or the deaf and dumb language. A representation is defamatory either if it is made in respect of a man's personal character and is calculated to "hold him up to hatred, contempt, or ridicule," or if it is made in respect of his credit and fitness in office, business, or profession, and is calculated to damage him therein.

Publication of a libel or slander consists in communicating it to any third person. In this connection the doctrine that for some purposes "husband and wife are one person" has been so applied that while a communication to the wife of the person whose reputation

[1] The Act of 1880 within somewhat narrow limits puts a workman in a position similar to that of an outsider in regard to injuries caused by defects in the works, machinery, and appliances, and by the negligence of certain of the master's employees, especially those charged with superintendence, but does not impose any liability in respect of injuries not due to the negligence either of the employer or of a fellow-servant. It has become of little importance since the introduction of a general liability of the master to make compensation. Both the Act of 1880 and that of 1906 impose a limit on the amount recoverable.

is attacked is a publication, communication to one's own wife is no publication. A publication may be made not only intentionally but negligently, as by putting a book into circulation without taking care to make sure that it contains nothing libellous.

The chief importance of the distinction between libel and slander lies in the rule that while a libel is actionable without any proof of "special damage," this is true of only a limited class of imputations made by way of slander, among which imputations of a criminal offence, of a woman's unchastity, and of incompetence, unfitness, or dishonesty in a man's business, office, or profession are the most important. Special damage means some loss which is pecuniary, or at any rate capable of being estimated in money, such as the loss of custom, or even loss of the hospitality (though not the society) of one's friends.

The proof of the substantial truth of a defamatory statement is a complete defence to any civil action brought in respect of it, and is known as "justification." This defence is, however, a dangerous one to bring forward, for it will fail if the defendant does not succeed in proving every material part of his allegations, and, in case of failure, the fact that the defence was attempted will incline the jury to give heavier damages.

In particular circumstances, a person is allowed with greater or less impunity to make defamatory statements, so as to incur no liability even if the statement is untrue. A defence founded on such a right is called the defence of privilege. Such privilege arises in numerous circumstances: the proceedings in Parliament; statements made in the course of judicial proceedings by judges, advocates, parties, and witnesses; reports of parliamentary and judicial proceedings; communications made in private life in the furtherance of some recognised duty or interest—*e.g.* confidential communications by a former to an intending employer with regard to the character of the servant—are all privileged. In some cases the privilege is *absolute*, *i.e.* it is not lost even if it is shown that the statement was made with knowledge of its falsity, or for mere purposes of ill-will; this is true of the privilege given to statements made in Parliament or in a court of law. In other cases, especially where the privilege exists in private relations, it is said to be *qualified*, and is lost if the statement is shown to have been made with "actual malice," *i.e.* with knowledge of its falsehood, or from ill-will, or for any purpose not justified by the circumstances of the privilege.

Disparaging statements made by way of

fair comment or criticism on matters of public interest, *e.g.* the conduct of men in public positions, or published works of art or literature, also enjoy immunity. The defence of fair comment will not cover misstatements of fact, except so far as they are merely reasonable inferences from the facts on which the comment is based. Recent decisions seem to have assimilated the defence of fair comment to that of privilege, by holding that a criticism actuated by improper motives cannot be a fair comment, even though the same criticism might have been fairly made by a person who had no such motive.

An apology coupled with a payment of damages into court may be pleaded in some cases as a defence, and in any case by way of mitigation.

Statements (whether made in writing or otherwise) which are not attacks on a man's character or credit or competence, but which cause damage, *e.g.* by casting doubt on his title to property, or disparaging the quality of his goods, are not defamatory. Such statements, however, are actionable if they are shown to be false, to have been made with malice, and to have caused actual damage.

(*c*) *Abuse of legal proceedings.*—A person may recover damages for malicious prosecution, if he can show :—

(1) That the defendant instituted against him criminal proceedings of such a kind as to be discreditable to his reputation or to involve possible imprisonment.

(2) That the proceedings have resulted in his acquittal, or at least have terminated in his favour by being discontinued.

(3) That the proceedings were taken without reasonable and probable cause, and

(4) That the proceedings were taken maliciously, *i.e.* from ill-will or any motive other than a desire to secure the ends of justice.

A somewhat similar liability is incurred by persons who maliciously institute bankruptcy proceedings against a man (or winding-up proceedings against a company), but it is not actionable to institute an ordinary civil action, however maliciously and unreasonably.

The tort of maintenance (which is also a crime) is committed by any person who gives unlawful assistance (as by furnishing or promising to furnish funds) to either plaintiff or defendant in a lawsuit, in which the person who gives such assistance has no legitimate interest. Such assistance is, however, not unlawful if it is given to members of one's family, or out of motives of charity to a poor man in order to save him from being deprived of his rights. Civil actions for maintenance are by no means extinct.

(*d*) *Interference with family and contractual relations, business, and employment.* — An old rule of law recognises that the master has an interest in the services of his servant, for which he is entitled to legal protection against third persons. He is entitled, for instance, to recover damages against a person who wrongfully harms the servant, as well as against one who knowingly induces the servant to leave him in breach of contract, or knowingly harbours a servant who has so left the master. No action can be brought for the loss of service caused by the death of a servant, though loss and expense incurred before the death can be recovered.

For some purposes a child (of any age) residing with a parent, and giving assistance in the household, is regarded as the parent's servant, and upon such service or fiction of service is founded the action which a parent is entitled to bring for the seduction of his daughter. "The action," it is said, "rests upon a fiction, but for this fiction there must be some foundation, however slender in fact." If the girl is under age, the parent is entitled to some service, and may therefore sue, even if she is not residing at home, so long as she is not in the actual service of another master, who would then be entitled to sue. If the girl is of age, some actual

service must be proved. "Making tea," it is said, "has been held to be service." The damages recoverable are of course not limited to the value of the service or any actual expense incurred.

For the most part, however, the action for loss of service is practically superseded by the wider modern rule — not confined to contracts of service—that it is an actionable wrong for a third person to cause damage by knowingly interfering with contractual relations. It is said that there may be some just cause or excuse for such interference or inducement to break a contract: a person who, acting from conscientious motives and in discharge of a social or moral duty, induced a child or near relation to break off an engagement to marry would probably be excused, but it is clear that the motive of self-interest in a trader who induces the employee of a rival to change masters is no such cause or excuse. It is difficult to justify the complete exemption from liability for inducement of breach of a contract of employment which has been given by the Trade Disputes Act, 1906, in cases where such a breach is induced "in contemplation or furtherance of a trade dispute."

Where, without any breach of contract, damage is done to a man's business through

interference which consists of acts criminal or wrongful in themselves,—for instance, by using violence to his customers,—there is no doubt that an action will lie. The same is true where the damage is caused to a trader by a rival who puts goods on the market so got up as to mislead purchasers into thinking that they are purchasing the goods of the former.

But further, within limits which are not clearly defined, it would seem that an interference with trade or employment causing damage is actionable at Common Law, though the interference is carried out by means of acts which in themselves are not unlawful. At any rate, persons who, acting in combination, intentionally cause such damage (and perhaps any form of damage) are liable in the absence of just cause and excuse. Thus damages were recovered against members of a trade union, who, acting in combination in order to punish an employer for his refusal to dismiss a non-unionist, withdrew his workmen, and induced a purchaser of his goods to leave him, by withdrawing or threatening to withdraw the workmen of the latter. On the other hand, a mercantile combination which sought to crush its rivals by underselling them, by offering special advantages to persons who dealt exclusively with members of the combination, and by refusing

to employ agents who acted for the rivals, was held to be justified on the ground of legitimate trade competition, and a similar principle seems to justify a spontaneous strike or combination of workmen.

For the great majority at least of the cases which are likely to arise in practice, any liability for interference with trade or employment would seem to be removed, on the one hand, by the rule that commercial competition is a just cause and excuse ; on the other, by the Trade Disputes Act, 1906, which has in effect put upon the footing of just cause and excuse the " contemplation or furtherance of a trade dispute." The exemption given by this statute applies where acts are done in combination which would have been lawful if done by persons acting without combination, or where an attempt is made to hold any person liable on the ground merely that his act is an interference with the trade, business, or employment of another, or with the right of another to dispose of his capital or labour as he wills.

(*e*) *Fraud.*—Fraud or deceit has already been dealt with as a matter vitiating a contract, and it has the same characteristics when considered as a tort. A person who sues for damage caused by fraud must show that he has suffered damage by acting on a

representation made with the intention that he should act on it; that the representation made was false, and that it was false to the knowledge of the person making it, or at least was made recklessly without any belief in its truth. The representation need not have been made directly to the person who acts on it, but it must have been made with the intention that it should reach him and that he should act on it.

It is only in exceptional cicumstances, as in the case of directors and others who issue the prospectus of a company, that any liability is incurred for a representation which is honestly believed in, but without sufficient or reasonable grounds.

(*f*) *Torts in respect of property.*—Trespass to property consists of any interference with property which is in the possession of another: entry upon land, causing missiles to fall upon it, posting bills on a fence (without the owner's consent), touching or damaging or removing goods, are all acts which amount to trespass. Even an entry on land below the surface, *e.g.* by mining, is a trespass; but though the ownership of land carries with it a right to restrain encroachments on the space above it, it is not clear that passing through the upper air is a trespass with regard to the land below.

Trespass is primarily an interference with possession. On the one hand, a person in

possession of property, whether land or goods, is entitled to resist and to sue any person who interferes with his possession and cannot show a better right to the possession. On the other hand, a person who is not in possession and has no present right to the possession—a reversioner of land, an owner of goods who has bound himself by agreement to leave the possession in the hands of another who has hired them for a definite time—cannot complain of a trespass as such, though he may he allowed to sue in a special form of action if he can show that his reversionary interest is damaged. The distinction is important, inasmuch as damage is not a condition of bringing an action of trespass. But a person who, though not in actual possession, is entitled to resume immediate possession, *e.g.* a gratuitous lender of goods, the landlord of a tenant at will, is equally entitled with the actual possessor to sue third persons for trespass.

An act which would otherwise be trespass may be justified if it is done by the consent of the owner, or in the exercise of a public or private right over the land. In the former case, a person who persists in remaining on the land or premises of another when the consent of the owner has been withdrawn becomes a trespasser, even if the consent was given under a binding agreement, though

the withdrawal of consent may be a breach of contract for which damages could be recovered. A right over land must not be used for other purposes than those for which the right exists: a man will be a trespasser on a public footpath if he goes there for the purpose of spying on the owner's adjacent premises or disturbing his game. An owner does not commit a trespass by taking his property from one who is wrongfully in possession of it, but the forcible retaking of land (but not of goods) is a criminal offence.

Not only is it a trespass to deprive an owner of any property of which he is in possession, or even to retain possession of land against the person entitled to it, but in the case of land it constitutes the wrong of dispossession, and in the case of goods is one of the forms of the tort known as conversion.

An owner wrongfully deprived or kept out of possession of land may bring an action to recover the land (sometimes called the action of ejectment), in which he will obtain an order for the restitution of the land itself as well as damages representing the value of the land for the time during which the wrongful possession has continued.

By conversion of goods is meant any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with

the owner's rights. It does not include mere acts of damage, but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them. A person who has converted the goods of another will be ordered to restore them, if they are still in his possession, otherwise to pay their value, and in any case to pay damages for the detention.

Though dispossession and conversion are regarded primarily as wrongs done to the owner, yet on the one hand a person who has not a present right to possession—*e.g.* a person whose estate in land is not a present but a future estate—is not entitled to sue for these wrongs: and on the other hand a man may have obtained possession from another in such a way, that though the latter is not the owner, the former will not be entitled to dispute his right. Thus a jeweller, to whom a chimney-sweep had handed for examination a jewel which he had found, was held liable to restore it to him, though it was obvious that the boy was not the owner.

Ignorance of another's rights is no defence to claims for trespass, dispossession, or conversion. A man who innocently buys goods from a thief (except in market overt) and sells them again must pay their value to the owner.

A private nuisance is an act which, without

being a trespass, interferes with a person in the enjoyment of his own land or premises, or of some right which he has over the land or premises of another. Thus it is a nuisance on the one hand to interfere with the comfort of a dwelling-house by the presistent production of noise, or fumes, or smells, to cause crowds to assemble so as to prevent access to a house or place of business, to divert or pollute the flow of water in a natural stream to which every owner of land abutting on it is entitled ; on the other, to interfere with rights of light for windows or private rights of way, or rights of common. It should be noticed that a man has no right of light for his windows unless such a right has been acquired by grant or bylong enjoyment, and therefore, in the absence of such a right, it is lawful to cut off light coming to a neighbour's window, by putting structures or buildings on one's own land.

A man has a right to have his land in its natural state supported by his neighbour's land, but if he erects buildings which need a greater degree of support, he can only acquire a right to it by grant or length of enjoyment. The withdrawal of a right of support, whether natural or acquired, is a nuisance.

It is a nuisance to allow the branches of one's trees to grow so as to overhang one's neighbour's land.

A person who suffers from a nuisance may remove it even without giving notice, if he can do so without going on to another's land, *e.g.* by cutting overhanging branches; otherwise it is said that he may do so after giving notice, but it would certainly be inadvisable to take such a step.

If an action for nuisance is brought, not only will damages be given, but the court may, and commonly does, grant an injunction forbidding its continuance and even ordering an offending structure to be pulled down.

A public nuisance is an unlawful act or omission which causes annoyance to the public generally, such as obstructing a highway, or (where there is a duty to repair) failing to repair it, or allowing rubbish and filth to be deposited on one's land to the annoyance of the neighbourhood. For a public nuisance no individual can sue unless he suffers damage peculiar to himself, as by breaking his leg through falling into a hole in the road. A public nuisance is, however, punishable as a misdemeanour, and the Attorney-General may take proceedings to obtain an injunction forbidding its continuance. Local authorities also have power to take proceedings to put a stop to public nuisances. A private person may remove an obstruction on a public way, but he may not repair a public way or bridge.

CHAPTER VIII

CRIMES

1. Sources of Criminal Law. — Our Criminal Law is almost entirely Common Law with large statutory additions and modifications and some attempts at consolidation or codification by statute. Equity never had anything to do with Criminal Law; and the Star Chamber, which in some ways bore the same relation to the Common Law Courts on the criminal side as the Chancery had to the Common Law Courts on the civil side, has long since disappeared, and with it its attempts to create new forms of criminal liability. Perhaps we owe to it the punishment by the Common Law Courts of some crimes, such as perjury, not known to the older Common Law. Piracy, which is practically robbery committed against a ship at sea, and which was at one time punished by the Admiralty Court, has also been taken up into the Criminal Common Law.

2. Civil and Criminal Law contrasted. —The difference between Civil Law (which has formed the main subject of the previous

chapters) and Criminal Law turns on the difference between two different objects which the law seeks to pursue—redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution : the wrong-doer is not punished, he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrong-doer ; to give him and others a strong inducement not to commit the same or similar crimes, possibly to reform him, possibly to satisfy the public sense that wrong-doing ought to meet with retribution. But this punishment is not directly or mainly beneficial to the person injured. If a fine is imposed it goes to the State ; if the criminal is imprisoned or put to death the injured man or his relations may feel some satisfaction, but the satisfaction of their feelings ought not to be regarded as the object of the punishment. In all cases of crime the law treats the wrong-doing as not merely an injury to an individual, but as a matter of public concern. An individual suffering civil injury need not sue the wrong-doer, and may contract not to sue him. Where a crime has been com-

mitted, the person injured cannot prevent proceedings being taken to secure punishment, and an agreement not to prosecute is a criminal offence. Criminal proceedings are taken in the name of the King as representing the State, and every citizen has a right to set the law in motion, whether he has been injured or not, and public officers exist to set the law in motion where necessary. The King can pardon crimes after conviction, and, except in the case of a trial by impeachment, even before conviction; but the King cannot pardon a civil wrong done to a private person, so as to deprive him of his remedy. So, again, the King can, through the Attorney-General, stop a criminal prosecution, but he cannot stop a civil action.

Many crimes may be committed without giving any one a right to bring a civil action: *e.g.* treason, and forgery where no one has been defrauded, so too perjury. On the other hand, many or most civil wrongs are not crimes: *e.g.* trespass where no wilful damage is done is no crime, and the notice that "trespassers will be prosecuted" has been well described as "a wooden falsehood."[1] In some cases, however, the same act is both a crime and a civil wrong, as in the case of

[1] Maitland, *Justice and Police*, p. 13. This and the two following sections owe a good deal to Maitland's chapter on "Civil and Criminal Justice."

injuries to the person and defamatory libel, and in general it may be said that any criminal act which causes damage to an individual is civilly actionable. In such cases both civil and criminal proceedings may, with some exceptions, be taken for the same act: it is not necessary to choose between the two, but the proceedings are quite distinct. Only in some exceptional cases can punishment and redress be obtained in the same proceedings; *e.g.* in case of theft, or obtaining goods by false pretences, the court which convicts may order the restitution of the goods to the owner; judicial separation may be obtained in proceedings by a wife against her husband on the ground of aggravated assault; so, too, in the case of petty offences the magistrates may order the guilty party to pay damages up to 40s. instead of punishing him.

3. Classification of Crimes and Offences. — Criminal offences may be broadly divided into two main classes: indictable offences, and offences punishable on summary conviction before magistrates. In cases of the former class (which in general comprises the more serious offences), the accused is *indicted* by a grand jury which decides on *prima facie* evidence whether there is any case at all against the prisoner; if they decide that there is not, they are said to

"throw out the bill." This, however, is not an acquittal, for he may be again indicted; it only means that they refuse to accuse him. If, as happens in the great majority of cases which come before the grand jury, a "true bill" is returned, the trial takes place before a judge or commissioner at the Assizes or before a Court of Quarter Sessions, in any case with a petty jury; the latter, subject to the right of the accused to appeal, finally decides whether he is guilty or not. If they bring in a verdict he can never be tried again for the same offence. In practice the process of indictment is preceded by an inquiry before a magistrate, or magistrates, who decide whether there is sufficient evidence to send the case for trial, and the procedure before the grand jury has thus come to be very much a matter of form. The decision of the magistrate is, of course, not conclusive either for or against the accused. In a certain number of cases of the less serious indictable offences the magistrates have now a power, with the consent of the accused, or, if he is under age, of his parent or guardian, to try and decide finally the whole case and inflict punishment but there is a limit to the amount of punishment which they can impose in such a case. And no one can be deprived of his right to be tried by a jury in such cases against his will.

Indictable offences are classified in a way which corresponds only roughly to the seriousness of the offence. At the head we have the offence of treason, which stands in a class by itself. Other indictable offences are divided into felonies and misdemeanours. At a time when felonies, with one exception, were punishable with death, and in any case involved forfeiture of the felon's property, the distinction was one of great importance ; at the present day felonies are still distinguished from misdemeanours in a number of points. The power to arrest without a warrant is even now more extensive in the case of felony than in that of misdemeanour. A person accused of felony is not, whereas a person accused of misdemeanour as a rule is, entitled to bail as of right ; the procedure at the trial differs, and a rule, of which the extent and application are uncertain, forbids a person who has suffered damage by an act which amounts to a felony from taking civil proceedings until the offender has been convicted. Felonies include most but not all of the more serious offences : murder and manslaughter, theft or larceny, in the strict sense of the word, embezzlement (which is often very hard to distinguish from theft), bigamy, and some kinds of forgery. Misdemeanour includes some very serious crimes: *e.g.* assaults on the King, riots, bribery,

perjury, blasphemous, seditious and defamatory libels, obtaining by false pretences, some kinds of forgery, and many serious frauds. Misdemeanours, however, include even offences which popularly would hardly be called crimes at all: a man or a body which is under a duty to repair a highway or a bridge and neglects to do so commits a misdemeanour, which will be tried by the same procedure as, for instance, perjury. Generally speaking, however, the offences which involve little, if any, moral blame are not misdemeanours, but are punishable on summary conviction.

In the cases of offences punishable summarily the magistrate or magistrates decide the whole case without a jury, and impose the punishment. This class includes a great number of minor offences: petty assaults, petty forms of dishonesty, *e.g.* travelling on a tramcar with the intention to avoid payment of the fare, cruelty to animals, failure to send one's children to school, riding a bicycle at night without a lamp, and so forth. In the more serious of these cases, where the accused is liable to imprisonment for more than three months, he has a right, if he chooses to insist on it, to be tried by indictment, *i.e.* have trial by jury.

4. Penal Actions.—There are some ex-

ceptional cases where the proceedings are in form civil, but in substance criminal, *i.e.* intended mainly to secure punishment and not redress. Proceedings of this kind are called *penal* actions. The reason why these actions are allowed is mainly historical. At one time the King's power to pardon crimes or to stop criminal proceedings was largely used to protect wrong-doers who were supposed to be acting in the King's interest, *e.g.* public officers who were breaking the law. In order to prevent an offender of this kind from escaping punishment, Acts of Parliament would provide, not that he might be indicted and tried like a criminal, but that an individual, or individuals, should have the right to bring an action of debt against him for a sum of money. In some cases this action was given to the "party grieved," *i.e.* to any one wronged by the breach of duty, and in such cases the penalty would serve the double purpose of compensation, though it might be out of all proportion to the wrong done, and also of punishment; still, the main object was to secure punishment. Thus the Habeas Corpus Act provides heavy money penalties against all who offend against its provisions: *e.g.* judges who refuse to issue the writ, officers who send a prisoner out of England. The right to the penalty is a

private right, enforceable like any debt; and the King has no power to pardon, at any rate, after the proceedings have been commenced. In other cases the right of action is given to the "common informer," that is, any member of the public who chooses to take proceedings; in others, again, to some corporation which represents professional interests, such as the Law Society or the Goldsmiths' Company.

5. General Principles. — The Criminal Law consists for the most part of the definition (often elaborate and even verbose, especially when Statute Law intervened) of the conduct which is necessary to constitute a crime, and the number of species and varieties of crime is so large that no detailed account is here possible, nor would a bare enumeration serve any useful purpose.

There are some immoral and dishonest acts which, whether for good reasons or bad, incur no punishment; but in general the prohibitions of the criminal law correspond with the moral sense of the community, and with few exceptions crimes are acts from which every man knows that he ought to refrain. It will be enough to say something of the general principles of liability, and to deal with a few points of interest in connexion with particular crimes.

In general the law punishes only acts and not omissions. The cases where an omission to perform a legal duty amounts to a crime arise chiefly in connection with homicide, and will be dealt with under that head. Further, an involuntary act, such as that of a person walking in his sleep, involves no criminal liability. An act done under compulsion or under stress of necessity is still a voluntary act, and it is only in extreme cases that necessity or compulsion can be pleaded as a defence to a criminal charge. It was held that shipwrecked sailors who killed a boy in order to preserve their lives by eating his body were guilty of murder. Coercion by threats of instant death or grievous bodily harm may excuse participation in a crime. The presumption or fiction of coercion of a wife by her husband has already been mentioned. It is hardly necessary to say that the fact that an act is done from a sense of moral or religious duty is no defence.

Ignorance that an act is criminal is no excuse. In some cases, however, the definition of a crime requires that the offender should know that he is violating some private right, and here ignorance even of a general rule of law may be material. Thus the taking of another's goods is no offence (though it is a civil wrong) if it is done in assertion of a

supposed right. Ignorance of fact, on the other hand, is to a very large extent a complete defence. A person who acts in the honest and reasonable belief that facts exist which would make his act entirely innocent, incurs no liability in the case of all the more serious crimes. A woman who married, honestly and on reasonable grounds believing that her first husband who had left her was dead, was held not guilty of bigamy, although he had not been absent for seven years, in which case she would have been expressly protected by statute. On the other hand, where a crime is so defined by statute that some circumstance is an essential part of it, the question may arise whether the intention was to punish the act whenever accompanied by the circumstance specified, or only when done with knowledge of the circumstance. To pass false money unwittingly is no offence;[1] to sell adulterated food is an offence, though one believes it to be unadulterated. In some cases it seems to be material that the act, even if done in the circumstances supposed by the prisoner to exist, would have been criminal or illegal, and perhaps even that it would have been immoral.

The word "maliciously," which often occurs in the definition of crimes against

[1] This is indeed expressly provided by statute.

property, means no more than that the act must be done intentionally and without justification or excuse or claim of right. Malice in connexion with criminal libel has the same meaning as in the law of torts. The meaning of "malice aforethought" in relation to homicide will be discussed later.

Something has already been said as to principals and accessories before the fact. They are all equally punishable. An accessory after the fact is one who knowingly receives, comforts, or assists a felon in escaping punishment. Such an accessory is liable in all cases to a maximum punishment of two years' imprisonment, except that in the case of murder the maximum is ten years' penal servitude. In treason, all parties to the crime (even one who in other crimes would be an accessory after the fact) are treated as principals. In misdemeanours there can be no accessory after the fact, but others participating in the crime are treated as principals.

The law punishes not only crimes actually committed, but also steps towards the commission of a crime which may never be completed. Such steps are incitements, attempts, and conspiracies. It is impossible to define precisely how closely an act must be connected with an intended crime to constitute an attempt. In practice little

difficulty seems to arise. Procuring dies for the purpose of coining false money is an attempt to commit that crime; buying a pistol in order to commit a murder would not be an attempt to murder. It is now settled that an act may be an attempt, though the commission of the crime was from the beginning impossible, *e.g.* there may be an attempt to steal from an empty pocket.

Any agreement between two or more persons to commit a crime is a conspiracy, but an agreement may under certain conditions be a conspiracy, even though the act agreed to be done is not a crime at all, but merely a civil wrong, a breach of contract involving serious public mischief, or even an act not illegal but grossly immoral or publicly injurious. The limits of the offence of conspiracy to do acts not in themselves criminal are ill-defined, but it is now declared by statute that a combination to do any act in contemplation or furtherance of a trade dispute is not indictable as a conspiracy unless the act would be punishable as a crime if done by one person alone.

6. High Treason.—Of the forms of High Treason defined in the Treason Act, 1351, only three are now of practical importance: "Compassing or imagining the King's death," "levying war against the King in his

realm," and "adhering to the King's enemies in his realm, by giving them aid and comfort in the realm or elsewhere." These words have been overlaid by a mass of judicial interpretation, the effect of which has been to convert treason from being mainly a breach of personal allegiance into a crime against the security of the State. With regard to the first of these, the "imagining" which seems at first sight a mere matter of intention, must, as is shown by the words of the statute itself, be proved by "open deed," which includes writing and printing, but not mere spoken words, unless they are spoken in furtherance of the intention which they express. It is settled that to constitute imagining the King's death it is sufficient if there is an intention to depose, or even an intention to levy war against the King, or to incite foreigners to invade the King's dominions.

"Levying war" again has been extended by judicial interpretation so as to include insurrections against the Government, insurrections intended to intimidate Parliament, and even insurrections for any general public object (*e.g.* in the eighteenth century it was held treason to cause an insurrection for the purpose of destroying all dissenting meeting-houses).

The offence can only be committed by a British subject, or by an alien who is for the

time being in the King's dominions and under his protection. A British subject cannot obtain immunity to fight against his country, by becoming naturalised in a hostile state when war has broken out or is on the point of breaking out.

Many of the interpretations put upon the statute were highly artificial, and had the result, especially at the end of the eighteenth century, of inducing juries to acquit the accused rather than find them guilty of an offence for which the only punishment was death, and, until 1814, death accompanied at least nominally by barbaric cruelties. Consequently some of the less serious forms of treason (though still punishable as such with death) have been constituted felonies punishable with a maximum penalty of penal servitude for life.

During the last quarter of a century only one prosecution for treason (arising out of the South African War) has taken place in this country. The prisoner was found guilty and sentenced to death, but the sentence was commuted, and at a later time the prisoner was released.

7. Unlawful Assembly and Riot.—An unlawful assembly is an assembly of three or more persons who meet with the intention of committing a crime likely to involve violence, or of carrying out any common purpose

(lawful or unlawful) in such a manner as to afford reasonable grounds for apprehending a breach of the peace. But if the object of the meeting is lawful there must at least be something violent or provocative in its conduct. An entirely peaceable procession of Salvationists was held not to become an unlawful assembly, because a band of roughs calling themselves the Skeleton Army intended to make, and in fact did make, attacks upon it.

A riot is an unlawful assembly which has begun to execute its common purpose by a breach of the peace and to the terror of the public.

Unlawful assemblies and riots are misdemeanours punishable by fine and imprisonment, in the latter case with hard labour. But under an Act of 1715, if twelve or more persons continue "unlawfully, riotously, and tumultuously assembled together" for more than an hour after a proclamation in words prescribed by the Act has been made by a sheriff or magistrate, they are guilty of felony, and incur a maximum punishment of penal servitude for life. The same penalty attaches to persons obstructing those whose duty it is to make the proclamation.

It is sometimes thought that no forcible measures to suppress a riot can be taken until the proclamation has been made and

an hour has elapsed. This however is a mistake. The statute no doubt gives an indemnity to those who, after the time has elapsed, use force in dispersing or arresting the rioters, even if some innocent person is unavoidably killed or injured. But the taking of all necessary steps, even to the shedding of blood, for the preservation of the peace, is both a matter of right and of duty at all times; and while the duty is one specially incumbent on magistrates and constables, they may require every citizen, and for this purpose soldiers are but citizens, to lend them assistance; in the absence of such officers the duty may fall directly on private persons present.

8. Libel.—A seditious libel is one calculated to bring into hatred or contempt or to excite disaffection against the King, the Government and Constitution, either house of Parliament, or the administration of justice; to excite the King's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established; to raise discontent or disaffection, or to promote feelings of ill-will or hostility between different classes.

The definition is a wide one, but the fact that the decision whether anything published is or is not a seditious libel rests with the jury makes it certain that the law cannot be

used by a Government for punishing the expression of opinions which meet with any considerable degree of approval in the community. And it is clear that an honest criticism or statement of errors committed by the Government or of evils in the constitution with a view to their reform or removal by lawful means is not seditious.

The speaking of seditious words is equally punishable with the publication of a seditious libel.

There is considerable uncertainty as to the definition of blasphemous libel. According to one view, blasphemy consists not only of offensive attacks on the Christian religion, its sacred books, and the formularies of the Church of England, but includes even a denial of the truth of Christianity or of the existence of God, however serious and decent in expression. According to another view, which was acted on in the few cases that have arisen during the last sixty years, there is no blasphemy unless the expressions used are intended to outrage the feelings of believers, to bring the Church into hatred and contempt, or to promote immorality. Here, too, the good sense of juries seems likely to be a sufficient safeguard against an oppressive application of the law.

Spoken words which are blasphemous are equally punishable.

For purposes of Criminal Law, defamatory libels include not only libels which would be actionable as torts, but also libels on the character of deceased persons, if intended to wound the feelings of the living. Further, a libel is sufficiently published to be criminally punishable if communicated merely to the person whose character is attacked.

The proof of the truth of a defamatory libel affords no defence to a criminal prosecution unless it is also shown that the publication was for the public benefit. The defences of privilege and of fair comment are as available in a criminal prosecution as in a civil action.

The speaking of words which would be actionable as slander is not a criminal offence.

All forms of libel are misdemeanours, and punishable by fine and imprisonment.

9. Murder and Manslaughter.—Murder and manslaughter are the two forms of unlawful homicide.

The taking of life is unlawful whenever it is done by an act which is intended, or is known to be likely, to cause death or bodily harm, unless the act can be justified on special grounds, such as the execution of a lawful sentence, the prevention of crime and the arrest of offenders, or the right of self-defence, the limits of which are somewhat narrowly

defined. On the other hand, there is no general duty to preserve life.

> "Thou shalt not kill, but needst not strive
> Officiously to keep alive,"

is generally true in our law. A man who, seeing another struggling in the water, stands by and lets him drown, when he might have saved him by throwing a rope, is guilty of no crime. It is only when a man is guilty of culpable negligence in failing to carry out a legal duty tending to the preservation of life that he is guilty of unlawful homicide, if death ensues in consequence of his omission. The duty may be one imposed by contract (as in the case of a railway signalman) or by a special relation between the parties (as in the case of a parent's duty to provide for children too young to provide for themselves), or it may be a legal duty to take precautions in doing an act which is dangerous if precautions are omitted (*e.g.* the duty of a motorist to give audible warning of his approach).

It is still the rule that an act which causes death is not homicide if the death occurs more than a year and a day after the commission of the act.

Murder is distinguished from manslaughter by the presence of "malice aforethought"; but this phrase has nothing to do with malice in any ordinary sense, and killing may

be murder without any premeditation. What is really meant is that an unlawful act or omission which causes death amounts to murder if it is accompanied by an intention to kill or cause grievous bodily harm (whether to the person killed or another), or by knowledge that it will probably cause death or grievous bodily harm. It is sometimes added that the mere intention to commit any felony or to oppose forcibly an officer of justice when engaged in arresting or imprisoning an offender will make killing murder; but the authority for this is doubtful.

Even an act accompanied by such intention or knowledge will be not murder, but manslaughter, if it is done by a man in the heat of passion caused by provocation (not sought or provoked by him), which deprives him of the power of self-control. Insulting words and gestures in themselves do not amount to provocation.

Suicide is murder: it follows that if two persons agree to commit suicide together, and only one of them succeeds, the survivor is guilty of murder.

The only sentence which can be passed for murder is that of death, but on special grounds the sentence is sometimes commuted; manslaughter is punishable with a maximum of penal servitude for life.

10. Offences against Property. — The

law relating to offences against property is an extraordinary tangle made up of common law rules which still reveal their primitive character overlaid by piecemeal legislation.

The core of this branch of the law is the common law crime of larceny or theft. It involves, as its essential elements, a violation of possession of goods and an intention to "convert," *i.e.* permanently to deprive the owner or possessor. It followed that a person who had lawfully come into possession of a thing (*e.g.* by borrowing it) could not steal it; but misappropriation under such circumstances is now made equivalent to theft by statute. Even now a finder of goods cannot steal them unless at the time of finding he believes that the owner can be discovered, and then and there determines to misappropriate. If, however, a thing is obtained wrongfully, though by an innocent mistake—*e.g.* by driving away one sheep belonging to another with one's own flock—a subsequent misappropriation amounts to theft. Since goods received by a servant from his master for the master's purposes are deemed to be in the master's possession, while those received by him for the master from a stranger are deemed to be in the servant's possession, a misappropriation by the servant is a theft in the former case, but not in the latter,

though it now constitutes the statutory crime of embezzlement.

When a person intending to misappropriate goods, fraudulently induces the owner to give him merely the possession and then misappropriates, he commits theft, as when a person gets goods pretending that he is the carrier sent to fetch them away; but if he fraudulently induces the owner to part with the ownership—*e.g.* induces a man to give money for sham diamonds, pretending that they are genuine—he commits not theft, but the statutory offence of obtaining by false pretences.

Land cannot be stolen. At Common Law things forming part of the soil, or built upon it, or growing out of it, could not be stolen by merely severing them; nor could title-deeds of land, or securities for money, or dogs be stolen. But misappropriations of these things are now punishable by statute. Wild animals, unless in a state of captivity, cannot be stolen; but the unlawful pursuit and taking of game and rabbits is by statute punishable with considerable severity.

It is only by statute that one co-owner can steal the common property.

Simple larceny is punishable with a maximum of five years' penal servitude; but aggravated forms of it—*e.g.* stealing from the person and robbery, as well as stealing certain

kinds of things, such as horses—are punishable much more severely. On the other hand, many offences which are made criminal only by statute are much more lightly punished; thus the theft of a dog involves no more than six months' imprisonment, whereas the theft of its collar is punishable as a Common Law larceny.

Frauds and misappropriations by agents, trustees, directors, and officers of companies and corporations are statutory offences. Forgery is making a false document with intent to defraud. The maximum punishment is in some cases seven years', in others fourteen years', penal servitude, in others penal servitude for life. Wilful and malicious injuries to property, whether land or goods, are punishable with various degrees of severity, ranging downwards from the burning of ships of war and Government dockyards (for which the punishment is still death) to such acts as trampling down grass standing for hay (for which the maximum punishment is two months' imprisonment and hard labour or a fine of £5).

Breach of contract is very rarely punishable; it is, however, a crime for workmen to break their contracts of service where the probable consequence will be to endanger life or valuable property, or to deprive a place of its supply of gas or water.

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